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TAXATION-FEDERAL ESTATE TAX-INCLUSION IN GROSS ESTATE OF TRANSFER BY WHICH SETTLOR RETAINED POWER TO TERMINATE

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TAXATION — FEDERAL ESTATE TAX — INCLUSION IN GROSS ESTATE OF TRANSFER BY WHICH SETTLOR RETAINED POWER TO TERMINATE—In 1928, decedent established a trust giving his wife the income for her life, with a remainder to his three children. Decedent, as co-trustee, retained power to pay portions of the corpus to his wife and to change the trust on his approval of a written request by his wife. When the estate challenged the commissioner's assessment of a tax deficiency, the Tax Court,[1] relying on the power to invade the principal, included the trust corpus in the gross estate under section 811(d)(2) of the I.R.C.,[2] no reduction being allowed for the wife's life estate since no method of evaluating it was offered. On appeal to the circuit court of appeals,[3] it was originally decided that the value of the life estate should be excluded on proof of its value by appropriate probability tables. Later, on rehearing, *held*, the opinion of the Tax Court affirmed. The entire trust was taxable because of the retention of the power to amend. Had the right to invade the corpus, viewed by the court as a power to terminate, been the only power retained, the value of the wife's life estate would

[1] 7 T.C. 705 (1946).
[2] 26 U.S.C. (Supp. 1947) § 811(d)(2).
[3] (C.C.A. 6th, 1947) 164 F. (2d) 959.

have been properly excluded. *Du Charme's Estate v. Commissioner of Internal Revenue*, (C.C.A. 6th, 1948) 169 F. (2d) 76.

The 1936 Amendment to the Revenue Act of 1926[4] expressly provided that, as to transfers after June 22, 1936, property transferred by a decedent subject to a retained power to alter, amend, revoke or terminate, was to be included in his gross estate.[5] Section 811(d)(2) of the I.R.C. relating to transfers on or prior to June 22, 1936, mentions only the power to "alter, amend or revoke," but the Supreme Court has interpreted section 811(d)(1) as merely declaratory of the law prior to its enactment, so that the power of termination is also included in section 811(d)(2).[6] The property subject to a power to terminate[7] is taxable whether or not the grantor exercises the power for his own benefit,[8] and even if the settlor expressly excludes its exercise in his interest.[9] Moreover, it is immaterial whether the donor exercises the power in the capacity of settlor or trustee.[10] The power must be one to terminate contingencies to which the possession or enjoyment of the beneficiaries is subject[11] and not merely one which accelerates the time of enjoyment or regulates trivial and unimportant matters.[12] The power to invade the principal in the instant case permitted the distribution of any or all of the corpus to the life tenant and a resulting diminution or extinguishment of the remainder

[4] The revision, now included as 26 U.S.C. (Supp. 1947) § 811(d)(1, 2), amending § 302(d) of the Revenue Act of 1926, 44 Stat. L. 9, c. 27, was made by Congress in 1936 following the decision of White v. Poor, 296 U.S. 98, 56 S.Ct. 66 (1935), which avoided a determination of whether the power to terminate was included within the power to alter, amend or revoke.

[5] Prior to the 1936 amendment, the power to terminate would probably not have been thought to come within the power to alter, amend or revoke. Helvering v. Helmholz, 296 U.S. 93, 56 S.Ct. 68 (1935).

[6] Commissioner v. Holmes' Estate, 326 U.S. 480, 66 S.Ct. 257 (1946).

[7] The power to terminate is here used to designate an acceleration in the distribution of a trust to the beneficiaries, while the power to revoke is employed to indicate that the settlor can return the corpus to himself.

[8] Commissioner v. Chase National Bank, (C.C.A. 2d, 1936) 82 F. (2d) 157; Commissioner v. Hofheimer's Estate, (C.C.A. 2d, 1945) 149 F. (2d) 733.

[9] Porter v. Commissioner, 288 U.S. 436, 53 S.Ct. 45 (1933); Mellon v. Driscoll, (C.C.A. 3d, 1941) 117 F. (2d) 477.

[10] Estate of Moir v. Commissioner, 47 B.T.A. 765 (1942); Welch v. Terhune, (C.C.A. 1st, 1942) 126 F. (2d) 695; Union Trust Co. of Pittsburgh v. Driscoll, (C.C.A. 3d, 1943) 138 F. (2d) 152; Commissioner v. Newbold's Estate, (C.C.A. 2d, 1946) 158 F. (2d) 694.

[11] Commissioner v. Holmes' Estate, 326 U.S. 480, 66 S.Ct. 257 (1946), 30 MINN. L. REV. 306 (1946).

[12] Theopold v. United States, (C.C.A. 1st, 1947) 164 F. (2d) 404; 46 MICH. L. REV. 1001 (1948); Commissioner v. Hofheimer's Estate, (C.C.A. 2d, 1945) 149 F. (2d) 733.

Where by state law the settlor, with the consent of all beneficiaries, may compel the trustee to terminate the trust, a similar retained power of termination does not subject the property to taxation. Helvering v. Helmholz, 296 U.S. 93, 56 S.Ct. 68 (1935); T.R. 105, § 81.20.

interest of the children.[18] Thus the decedent retained a power to terminate the trust by accelerating payment of the remainder to his wife, and at least the value of the remainder was includible in the gross estate. Since the wife's estate was not subject to this power of termination, had it been the only power retained by the settlor, only the value of the remainder would be included. However, the court looks to the adjunctive power to amend and, interpreting it as a power of the settlor to change either the life estate or the remainder, finds this sufficient of itself to include the entire trust within the gross estate.

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[18] 7 T.C. 705 at 711 (1946).