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TAXATION-ESTATE TAX-RESERVATION OF POWER TO AMEND TRUST

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TAXATION—ESTATE TAX—RESERVATION OF POWER TO AMEND TRUST—Settlor executed a trust indenture in 1915 whereby a trust was established for the benefit of his three minor children. Income was to be accumulated for the benefit of the three children until they respectively attained majority, and provision was made for the death of any child under 21 without surviving issue. The settlor then reserved "the power from time to time by an instrument in writing signed by me to amend this trust instrument so that it will more clearly express my actual intentions if I shall consider such amendments advisable, as to which I shall be the sole judge."[1] The commissioner determined that this reserved power constituted a power to amend within the provisions of section 811 (d) (2) of the Internal Revenue Code,[2] and that the corpus was therefore subject to the estate tax. Plaintiff, settlor's executor, paid the assessment and sued in the district court to recover the payment. The district court held for the United States.[3] On appeal, *held*, reversed. *Theopold v. United States*, (C.C.A. 1st, 1947) 164 F. (2d) 404.

The court held, contrary to the holding of the district court, that the dispositive clauses of the trust indenture were ambiguous, and that the reserved power related only to trivial and unimportant changes which would not render the corpus taxable.[4] The problems of the instant case are two-fold: (1) inter-

[1] Principal case at 404.

[2] Sec. 811: "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . ., (d) (2) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person to alter, amend or revoke. . . ." See E.T.R., § 81.20.

[3] (D.C. Mass. 1947) 69 F. Supp. 946. The court reasoned that the dispositive clauses of the indenture were clear and unambiguous; that to construe the reserved power as one to clarify what was already clear would be to render it a nullity; therefore this was a reservation of power to amend the trust to conform to the settlor's subsequent intentions and was sufficiently broad to come within the provisions of § 811 (d) (2).

[4] The court held that the reserved power was only a power to clarify these dispositive clauses in order to better express the settlor's original intentions. This narrow construction was warranted, the court said, by the terms of the trust indenture and the fact that four of the five amendments clearly dealt with clarifications of the dispositive clauses. The Fifth Amendment gave to the beneficiaries testamentary powers of appointment; it was conceded that this latter change was more than a

pretation of the instrument in order to ascertain the extent and scope of the reserved power, and (2) application of section 811 (d) (2) of the Internal Revenue Code. In general the power to amend will not be strictly construed so as to permit only minor changes in the mechanics of the trust unless the text of the indenture indicates such a construction.[5] However, the intent of the settlor is controlling.[6] The court's construction of the power as one to clarify "what he had said in the trust instrument, not to change it to say something else" [7] is tenable in view of the fact that the indenture redounded with ambiguities, and the actual changes made by settlor. In general the actual changes made are a fair guide to the intent of the settlor. Thus the settlor was found to have retained only a power to clarify his original intentions, and not to shift the beneficial enjoyment of the property. The test of taxability is whether or not the enjoyment of the property theretofore transferred by the decedent is subject at the date of his death to any change through the exercise by the decedent of the described power.[8] Thus the power to change beneficiaries [9] or to change the amounts they are to take [10] renders the corpus taxable. On the other hand if the reserved power is but a power to make minor amendments affecting only trivial and unimportant things the property subject to the power is not taxable; [11] and furthermore it has been doubted whether Congress could constitutionally tax the property in such case.[12] It seems reasonably clear, therefore, that the decision in the instant case is defensible; but it is questionable whether the result would have been the same if the appeal had been from the Tax Court.[13]

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clarification of original intention; but this was hurdled by holding that the settlor simply erred in believing that this change expressed his original intention.

[5] Welch v. Terhune, (C.C.A. 1st, 1942) 126 F. (2d) 695.

[6] Brewer v. Hassett, (D.C. Mass. 1943) 49 F. Supp. 501; Theopold v. United States, (D.C. Mass. 1947) 69 F. Supp. 946.

[7] Principal case at 406.

[8] Supra, note 4.

[9] Bank of New York & T. Co. v. Commissioner, 20 B.T.A. 677 (1930).

[10] Commissioner v. Chase Nat. Bank, (C.C.A. 2d, 1936) 82 F. (2d) 157; Holderness v. Commissioner, (C.C.A. 4th, 1936) 86 F. (2d) 137.

[11] Commissioner v. Hofheimer's Estate, (C.C.A. 2d, 1945) 149 F. (2d) 733.

[12] Lowndes, "The Constitutionality of the Federal Estate Tax," 20 VA. L. REV. 141, 161 (1933).

[13] Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239 (1943). Paul, "Dobson v. Commissioner: The Strange Ways of Law and Fact," 57 HARV. L. REV. 753 (1944).