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TAXATION-FEDERAL ESTATE TAX-USE OF ACTUAL LIFE EXPECTANCY WITHOUT REFERENCE TO ACTUARIAL TABLES IN VALUING CHARITABLE REMAINDER

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TAXATION—FEDERAL ESTATE TAX—USE OF ACTUAL LIFE EXPECTANCY WITHOUT REFERENCE TO ACTUARIAL TABLES IN VALUING CHARITABLE REMAINDER—Decedent, Nicholas Murray Butler, died testate on December 7, 1947. He bequeathed property to trustees, directing that the income be paid to his wife, Kate, for life, and upon her death the trust to terminate and a stipulated portion of the corpus be paid to the trustees of Columbia University. *Held,* the facts in existence at the time of decedent's death were such as to render it certain that Kate La Montagne Butler would not live more than one year after decedent's death, hence it was proper to use that expectancy, without reference to actuarial tables, in valuing the charitable remainder for purposes of a section 812(d) deduction. *Estate of Butler,* 18 T.C. No. 117 (1952).

Although the court referred to the problem of the valuation of the charitable remainder as a "further minor issue," the Commissioner of Internal Revenue has not appeared disposed to throw away his mortality tables in cases where a deductible remainder, subject to an estate in an aged and ailing life tenant, necessarily must be valued. While use of mortality tables in the principal case was directly contrary to existing authority,[1] a case may be made for the Commissioner's action. The most obvious reason for his reluctance to follow the previous decisions on this point would seem to be his dissatisfaction with the test, or the lack of one, to be inferred from such decisions. In other words, the Commissioner would evidently like some guide with respect to the question of where exclusive use of mortality tables should be discontinued and exclusive

[1] Estate of Hendrick, 9 T.C.M. 581 (1950); Huntington National Bank v. Commissioner, 13 T.C. 760 (1949); Estate of Jennings, 10 T.C. 323 (1948); Estate of Denbigh, 7 T.C. 387 (1946), noted in 60 HARV. L. REV. 152 (1946).

use of medically-attested life expectancy should begin.[2] Thus far the courts have been vague on the matter, with the result that the Commissioner has made the choice which results in greater revenue. Section 812(d) of the Internal Revenue Code is silent on the matter of valuation, and it is necessary to look to the regulations for the accepted procedure.[3] Nothing can therein be found which permits actual life expectancy, though proved, to take precedence over the actuarial tables laid out. Nor can anything be found to support the proposition that the tables are "evidentiary" only.[4] The courts have thus, at least to a degree, taken the matter of valuation in this narrow field into their own hands, and have attempted to apply principles which they consider more equitable than those embodied in the regulations. Certainly much can be said for the use of actual life expectancy in situations such as that presented in the principal case: (1) it would seem extremely inequitable to use a test designed for persons of average health where the party involved is clearly far from average in this respect; (2) certainly no tax avoidance devices are opened up; (3) there is no evident reason why the Commissioner will not be allowed to insist upon the application of the rule of the principal case to increase the value of a section 811(a) remainder in a decedent's estate in situations where the life tenant's actual expectancy is very short.[5]

However, granting that a point is reached where medical life expectancy is nothing more than an educated guess, it is clear that a line of sorts must be drawn beyond which the use of actuarial tables should be unquestioned. Until such line is drawn, the Commissioner will probably continue to cause vexatious litigation by virtue of his determinations. It is interesting to note that in those cases where actuarial tables have given way to actual life expectancy, two factors have always been present: (1) the actual expectancy of the life tenant, at the time of decedent's death, was very short because of critical illness—one year

[2] For cases in which the use of the Actuaries' or Combined Experience Table of Mortality has been approved see Palfrey v. United States, (D.C. Mass. 1940) 36 F. Supp. 153; Ithaca Trust Co. v. United States, 279 U.S. 151, 49 S.Ct. 291 (1929); Simpson v. United States, 252 U.S. 547, 40 S.Ct. 367 (1920).

[3] Treas. Reg. 105, §81.44(a), provides, "Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable corporation, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor from column 3 of Table I or II of section 81.10(i), or of Table A or B of section 81.10(j), whichever is applicable." (The above quotation is taken from the regulation as amended subsequent to the decision in the principal case, but the provisions pertinent to the point in discussion have not been materially changed.)

[4] "The use of established mortality tables, which are evidentiary only, must give way to the proven facts which show a lesser life expectancy." Principal case; Estate of Jennings, supra note 1; Estate of Denbigh, supra note 1.

[5] But compare Palfrey v. United States, supra note 2, where the decedent's executor unsuccessfully attempted to reduce the value of such a remainder on the grounds that the life beneficiaries were "people independently wealthy and without business cares or worries" and that it was "reasonably certain that they would live longer than the term of years allotted to them by the Actuaries' or Combined Experience Table of Mortality."

or less in all but one case;[6] (2) the life tenant involved has always substantiated the medical predictions by dying within the period of actual expectancy, and before the time when the question is litigated. It is submitted that the necessary test could be framed accordingly. It would be possible to allow actual life expectancy to take precedence over actuarial tables only where the actual expectancy, at the time of decedent's death, is less than the time allowed for the filing of the return[7] and where the life tenant has in fact died before the expiration of such time.[8] A more lenient alternative would be to establish a fixed period, say three years, and allow a refund in cases where the life tenant's actual expectancy, at the time of decedent's death, is less than the stipulated period and his death does in fact occur within that time, the refund amounting to the excess in tax resulting from the use of mortality table expectancy.[9] At any rate, the present situation dictates that some test be incorporated into the regulations or into the statute.[10]

Gene E. Overbeck, S.Ed.

[6] In Estate of Denbigh, supra note 1, the actual expectancy was "one or two years," actual death occurring one year, six months, and twelve days after the death of the decedent.

[7] Treas. Reg. 105, §81.63 allows fifteen months for the filing of the return.

[8] Compare Ithaca Trust Co. v. United States, supra note 2, where the decedent's wife was given a life estate, remainder over to charities. Although the wife died within a year after the decedent's death, and within the period allowed for valuing deductions and filing the tax, it was held that the wife's life estate must be valued as of the time of the death of the decedent, and since at that time the wife was in normal health, her life expectancy was correctly calculated according to mortality tables.

[9] Any fixed period may seem arbitrary, but see I.R.C., §812(c) for a comparable provision.

[10] A related field involves the bequest of a charitable remainder contingent upon the death of the life tenant without issue. To the extent that sterility and the remoteness of the possibility of issue will be recognized in tax determinations, see Farrington v. Commissioner, (1st Cir. 1929) 30 F. (2d) 915; United States v. Provident Trust Co., 291 U.S. 272, 54 S.Ct. 389 (1934); City Bank Farmer's Trust Co. v. United States, (2d Cir. 1935) 74 F. (2d) 692; Ninth Bank and Trust Co. v. United States, (D.C. Pa. 1936) 15 F. Supp. 951; Hoagland v. Kavanagh, (D.C. Mich. 1941) 36 F. Supp. 875.