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## TAXATION - FEDERAL ESTATE TAX - INTER VIVOS TRUST AS GIFT TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT DEATH

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TAXATION — FEDERAL ESTATE TAX — INTER VIVOS TRUST AS GIFT TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT DEATH — On May 14, 1919, decedent set up six trusts, appointing life estates with remainders over. Each trust deed provided: "This Trust may, during the lifetime of the Grantor, be amended or revoked on the joint consent of the Grantor and the Trustees." The remainderman, who was the same person in each trust, was also one of the three trustees. Decedent died on September 4, 1928. The Board of Tax Appeals sustained the contention<sup>1</sup> of the Commissioner of Internal Revenue that the value of the life estates should be included in the decedent's gross estate by virtue of section 302 (c) of the Revenue Act of 1926,<sup>2</sup> as gifts "intended to take effect in possession or enjoyment at or after his death." On appeal it was held, by a two to one decision, that the Board of Tax Appeals erred, since the remainderman's interests were adverse to amendment or revocation of those parts of the trusts granting life estates, and since section 302 (d) should not be applied retroactively. *Mackay v. Commissioner*, (C. C. A. 2d, 1938) 94 F. (2d) 558.

The principle upon which revocable trusts are included in valuing a decedent's gross estate for federal estate tax purposes is that such gifts are not complete until grantor's death, since the grantor in effect retains control over the gifts if he can revoke the trusts.<sup>3</sup> The majority decision, in reaching the conclusion that the trustee-remainderman had such an adverse interest in the trusts as to negative any effective power in the grantor to amend or revoke, proceeds upon the theory that if the gifts of the life estates were revoked, subsequent life estates would be measured by the lives of the new grantees, and that, for this reason, the remainderman would not give his consent to such a change. Such is not necessarily the case. When the trusts in question were set up, the remainderman took a vested interest in each trust, subject to be divested.<sup>4</sup> It may be assumed that his consent would be necessary to revocation if the life estates, having been revoked, were to be measured by the life of the grantor or the lives of the subsequent life tenants, because of the possibility that the grantor or subsequent life tenants would live longer than the original life tenants. Whether such a possibility is a sufficiently adverse interest had never been passed on by the federal courts heretofore. However, the remainderman's

<sup>1</sup> *Mackay v. Commr.*, 33 B. T. A. 765 (1935).

<sup>2</sup> 44 Stat. L. 70, 26 U. S. C. (1934), § 411 (c).

<sup>3</sup> *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123, 66 A. L. R. 397 at 404 (1929).

<sup>4</sup> *Shukert v. Allen*, 273 U. S. 545, 47 S. Ct. 461 (1927).

interests would not be adverse to the revocation and granting of new life estates if the new life estates were measured by the lives of the original life tenants. Therefore, the grantor could, to that extent, revoke without the consent of the remainderman.<sup>5</sup> Since trustees' interests are not adverse to revocation within the meaning of the federal estate tax statutes,<sup>6</sup> the gifts of the life estates, it may be argued, were not complete until the death of the grantor,<sup>7</sup> and the value of the life estates should have been included in decedent's gross estate under section 302 (c) of the Revenue Act of 1926. It was also argued before the court in the principal case that the value of the life estates should be included in decedent's gross estate under the additional language of section 302 (d) as transfers "by trust . . . 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. . . ." Under this section it would be immaterial whether the remainderman's interest was adverse or not.<sup>8</sup> However, this section was added by the Revenue Act of 1926, and the court felt it should not be applied retroactively to a trust created before that date.<sup>9</sup>

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<sup>5</sup> 1 TRUSTS RESTATEMENT, § 37 (1935); 2 *ibid.*, § 330 (1).

<sup>6</sup> *Helvering v. City Bank Farmers' Trust Co.*, 296 U. S. 85, 56 S. Ct. 70 (1935).

<sup>7</sup> *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 49 S. Ct. 123 (1929).

<sup>8</sup> *Helvering v. City Bank Farmers' Trust Co.*, 296 U. S. 85, 56 S. Ct. 70 (1935).

<sup>9</sup> On the question of retroactivity, see the discussion in 34 MICH. L. REV. 1002 at 1007 (1936).