TAXATION OF RENUNCIATIONS OF INTERESTS IN DECEDENTS' ESTATES UNDER THE FEDERAL ESTATE AND GIFT TAXES

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The recent case of *Hardenbergh v. Commissioner*[1] raises the question of whether a renunciation of a share in a decedent's estate is a taxable transfer under the federal estate and gift taxes. In *Brown v. Routzhan*,[2] a decedent renounced part of the property which had been devised to him by his wife's will. Although this renunciation took place eight years after the probate of the will, it was valid under state law, since it was made before final distribution. In holding that the decedent, by renouncing, had not made a gift in contemplation of death, the court pointed out that the government was attempting to collect a tax upon the exercise of a right to refuse a gift of property, not a tax on the transfer of an interest in property. The court said:[3]

> "The decedent never owned nor had any control of the property as donee. All that he had was a right to accept. Coupled with this right was an equal right to reject. Eeither could be exercised so long as the estate was in administration. He did reject."

In the *Hardenbergh* case the two petitioners, wife and daughter of a decedent who died intestate, formally renounced their interest in the estate, with the result that the decedent's son received the entire estate. The issue before the Tax Court was whether the petitioners had made a taxable gift of their share of the estate to the son. The court said that under the intestate laws of Minnesota, the state in which decedent died, the petitioners had no power to prevent, by renunciation, the vesting of title of the property in themselves. It was further held that the instrument executed by the petitioners renouncing their shares evidenced "the passage of title from petitioners of the property they

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[1] 17 T.C. #20 (1951).

[2] 63 F.2d 914 (6th Cir. 1933).

[3] *Ibid.*, p. 917.

had inherited under the laws of Minnesota," and that this action constituted a transfer which was subject to the gift tax. The court distinguished *Brown v. Routzhan* on the basis that a will was involved there, while in *Hardenbergh* the decedent died intestate and under state law a devisee or legatee could renounce, but there was no such provision for a person taking by intestacy.

In *Hardenbergh v. Commissioner,* the Tax Court made no attempt to distinguish the case from *Brown v. Routzhan* on the ground that "transfer" should be defined differently under the gift and estate taxes. Nor does it appear that there is any distinction between the two cases on this basis. The term "transfer" is used in both taxes without any attempt to define it.[4] However the cases indicate that it is used in the same sense in connection with both the estate and gift tax. Thus in *Burnet v. Guggenheim*[5] the Supreme Court said that Congress, in enacting the gift tax statute, had adopted the concept of "transfer" as interpreted under the estate tax.[6] In other cases the courts have repeated that the two taxes are closely related and the "transfer" under the gift tax means the same thing as transfer under the estate tax.[7]

Since the term transfer is used in the same sense under both taxes it would appear that the *Hardenbergh* case is either inconsistent with *Brown v. Routzahn,* or that it must stand on the basis of a distinction between the renunciation of property passing under a will and by intestacy.

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[4] 26 *U.S.C.A.* § 811 Gross Estate. This section includes in the gross estate of decedent the value at his death of all property (c) (1) "to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or other wise— (A) in contemplation of his death:"

26 *U.S.C.A.* § 1000 (a) imposes a tax on the transfer of property by gift and states in (b) "The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible:"

[5] 288 U.S. 280 (1933).

[6] *Ibid.* The court stated that the gift and estate taxes were *in pari materia.*

[7] Harris v. Commissioner, 178 F.2d 861 (2nd Cir. 1949); Higgins v. Commissioner, 129 F.2d 237 (1st Cir. 1942).

The distinction drawn by the *Hardenbergh* case finds support in the state laws of testacy and intestacy. It is usually held that title to property does not pass to a legatee or devisee under a will until he accepts it, or if it does that the title vests subject to the right to renounce and if this right is exercised, the renunciation relates back to the testator's death and renders the gift void from the beginning.[8] On the other hand, there appears to be substantial support among the text writers, at least, for the proposition that when a person dies intestate his property passes to his heirs who cannot prevent the passage of title to them by renunciation.[9]

Even though the distinction made in the *Hardenbergh* case finds support in the local law of decedent estates, it may well be doubted whether this should be controlling on federal tax questions. The courts have repeatedly emphasized that taxation is not so much concerned with the technicalities of title as it is with changes in economic benefits and the realities of the particular transaction.[10] It appears that, in determining whether a taxable gift has been made, the federal courts might well ignore technicalities of title under local law and consider whether there was such a change in economic benefits and control over the property as to justify the imposition of a gift or estate tax upon renunciation of these rights. Although a devisee or legatee can refuse to take the title to property, he nevertheless has had, prior to such refusal, as much control over the property and has enjoyed as much benefit from it as an heir who had title forced on him and then released his right to the property. Under this line of reasoning it is hard to perceive

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[8] 4 PAGE, WILLS §§1401 and 1402 (3rd Ed 1941); In re Kalt's Estate, 16 Cal.2d 807, 108 P.2d 401 (1940); Albany Hospital v. Hanson, 214 N.Y. 435, 108 N.E. 812 (1915); Bouse v. Hull, 168 Md. 1, 176 Atl. 645 (1935); Coomes v. Finegan, 233 Ia. 448, 7 N.W. 2d 729 (1943); Perkins v. Isley, 224 N.C. 793, 32 S.E.2d 588 (1945); Greely v. Houston, 148 Miss. 799, 114 So. 740 (1927); Bradford v. Leake, 124 Tenn. 312, 137 S.W. 96 (1911).

[9] PAGE, *Ibid*, § 1401. Also see DART'S LA. CIV. CODE 1945, Art. 977, which illustrates that one state, at least, permits an heir to renounce his intestate's share in a decedent's estate.

[10] Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Burnet v. Guggenheim, 288 U.S. 280 (1932); Commissioner v. Wilder's Estate, 118 F.2d 281 (5th Cir. 1941).

any sensible distinction between *Brown v. Routzahn* and the *Hardenbergh* case.

In *Lyeth v. Hoey*[11] the issue was whether the property which an heir received under compromise of a will contest, by which the will was admitted to probate and the legatee paid the heir part of the estate, was exempt from the income tax as property acquired by "gift, bequest, devise, or inheritance." Under the state law the property apparently was received by the heir as the result of a contract. The Supreme Court, however, held that "inheritance" as that term was used in the federal tax statute was to be construed according to a uniform federal definition rather than according to the local state law and that the heir took tax-free by inheritance. The court said:

> "In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nation-wide scheme of taxation.' Burnet v. Harmel, 287 U.S. 103, 110, 53 S.Ct. 74, 77.*** Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon the state law.
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> Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should

[11] 305 U.S. 188 (1938). See also Commissioner v. Tower, 327 U.S. 280 (1946) where a husband had given his wife property which she transferred to a partnership and became a partner with her husband. The wife contributed no services to the partnership but received part of its profits. The Court held that these profits should be taxed as income of the husband and the Supreme Court upheld the Tax Court. The taxpayer contended that the partnership was valid under state law and it should consequently be held valid for tax purposes. In overruling this contention the court stated that a state cannot have the final word and decide issues of federal tax law. The court continued, "But the Tax Court in making a final authoritative finding on the question whether this was a real partnership is not governed by how Michigan law might treat the same circumstances for purposes of state law."

> not be decided one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York, according to the differing views of the state courts."

If the term inheritance is to be given a uniform meaning under the income tax it is difficult to see why "transfer" should not be given a uniform federal definition under the estate and gift taxes.

According to *Lyeth v. Hoey* in the construction of federal tax acts terms should be interpreted "so as to give a uniform application to a nation wide scheme of taxation" unless there is language evidencing a different purpose. It has also been held that a uniform federal definition should be resorted to in gift and estate tax cases.[12] The statutes have no express language requiring that state law be followed in deciding what constitutes a transfer,[13] and the fact that "transfer" is defined in a broad sense indicates that local law should not confine the statutory definition. Obviously the line of reasoning adopted by the *Hardenbergh* case which makes the taxability of a renunciation turn upon narrow distinctions of the local law of the decedent estates may lead to a lack of uniformity in the administration of the gift and estate taxes and result in tax distinctions which are not based on real economic differences.[14]

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[12] Commissioner v. Greene, 119 F.2d 383 (9th Cir. 1941) (a gift tax case holding that federal law was to be applied in determining whether there was consideration in a transaction); Bahr v. Commissioner, 119 F.2d 371 (5th Cir. 1941) (which involved deduction provisions of the estate tax); United States v. Pelzer, 312 U.S. 399 (1941) (deciding whether there was a gift of a future interest).

[13] *Supra*, note 6.

[14] It is true that local law almost necessarily determines whether any rights or interests in property are transferred or created. Rhodes v. Commissioner, 41 B.T.A. 62 (1940). But see Richardson v. Commissioner, 126 F.2d 562 (2nd Cir. 1942). And in some cases it has been held not only that the rights created by a particular transaction are to be determined by state law but also that the federal tax consequences of such transactions are to be governed by the local law. Poe v. Seaborn, 282 U.S. 101 (1930); Lang v. Commissioner, 304 U.S. 264 (1937). However, most of the decisions which have held that the tax consequences of a transaction were controlled by state law have been cases involving community property where the results of following the local law are hardly to be commended.

If local law is to be disregarded and a renunciation of an interest in an intestate estate placed upon the same footing as a renunciation under a will there still remains the problem of whether both transactions are to be treated as a "transfer" resulting in estate and gift tax liability or as a mere refusal to accept a benefit which does not result in a tax. The courts should determine which of these theories should prevail by considering the policies of the tax laws and the actual power, control and benefit that the heir or devisee possesses because of his ability to refuse the property and in that manner direct who shall receive it.[15] In deciding this issue the courts will have to take into account the fact that by renunciation the heir or devisee could only make the property available to a limited number of persons. Another factor is that the heir or devisee had this choice forced upon him. On the other hand, however, the heir or devisee actually has the power to dispose of the property as he wishes and renunciation is only one means of disposal. If a person were allowed to refuse property to which he was entitled by the death of another and by this refusal enable someone else to receive the property renunciation could become a widely used means of tax evasion. Whether or not, however, renunciations of interests in decedents' estates should or should not be taxed under the estate and gift taxes, it seems reasonably clear that there is no justification for drawing the distinction between renunciations under a will and renunciations in connection with intestacy. Both should be treated as a taxable transfer, or neither should.

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[15] In this connection it is perhaps worth noting Commissioner v. Mott, 85 F.2d 315 (6th Cir. 1936). In that case the court held that a trustee who renounced all right to his commissions had not constructively received them and that, consequently, they did not represent taxable income to him. The Senate Finance Committee in its report on the 1948 Revenue Bill said in part, ". . . if any person disclaims or refuses an attempted gift a transfer by gift is not considered made." 1948-1 CUM.BULL. 353.

§§811 (f)(2) and 1000 (c)(2) I.R.C. as amended by PUB. L. 58, 82 CONG., 1ST SESS. (June 28, 1951) provide that the disclaimer or renunciation of a power of appointment shall not be treated a taxable transfer under the federal estate and gift taxes.