FEDERAL ESTATE TAXATION: MULTIPLE DEDUCTIONS ALLOWED UNDER SECTION 2055 FOR ONE CHARITABLE CONTRIBUTION

In an interpretation of Internal Revenue Code section 2055(b)(2) the Third Circuit in Estate of Miller v. Commissioner *has allowed a marital and charitable deduction to the donor of a life estate with a power of appointment and a charitable deduction to the estate of the surviving spouse, although charity received only one contribution. This note analyzes the court's decision in reference to the legislative history of section 2055(b)(2) and to the relationship of section 2055 to section 2056. Additionally, suggestions are made concerning the revision of section 2055(b)(2) so as to more clearly reflect the original congressional intent in enacting that section.*

The estate tax provisions of the Internal Revenue Code allow deductions from the gross estate for property donated to charity and for property left to the surviving spouse.[1] In what is apparently the first judicial examination of Internal Revenue Code section 2055(b)(2), the Third Circuit decision in *Estate of Miller v. Commissioner*[2] has allowed not only a marital deduction and a charitable deduction to the donor of a life estate with a power of appointment but also a charitable deduction to the estate of the surviving spouse, notwithstanding receipt by charity of only one property interest. Because of the general statutory scheme of the charitable contribution section and the probable congressional intent in amending that section, the validity of the court's holding is questionable. Section 2055(b)(2) and the Third Circuit's opinion in *Miller* indicate a necessity not only for clarification of the section but also the need for particular scrutiny by Congress in passing legislation designed to apply to a special case.

[1] INT. REV. CODE of 1954, §§ 2055-56. *See generally* C. LOWNDES & R. KRAMER, FEDERAL ESTATE AND GIFT TAXES §§ 16-17 (2d ed. 1962) [hereinafter cited as LOWNDES & KRAMER]; 4 J. MERTENS, FEDERAL ESTATE AND GIFT TAXATION §§ 28-29 (1959) [hereinafter cited as MERTENS].

[2] 400 F.2d 407 (3d Cir. 1968). The Third Circuit consolidated for argument and decision the cases of Estate of Edna A. Miller, 48 T.C. 251 (1967) and Estate of Hugh G. Miller, 48 T.C. 265 (1967).

Edna Miller provided by will that her estate be held in trust and that the income of a forty percent share of the trust corpus go to her husband Hugh for life with a power to appoint the corpus "to or in favor of his estate . . . or to any person or persons."[3] Edna's will further provided that if Hugh died without exercising the power, the income from the forty percent share was to pass to her son for life with the principal at his death going to the Edna Allen Miller Foundation, a qualified, tax exempt organization.[4] Within one month following Edna's death, Hugh executed an affidavit, filed with Edna's estate tax return, averring that he was eighty-four years old at Edna's death and indicating his intent to include in his will an appointment of the income from the forty percent share to his son with a remainder, the principal, to the Edna Allen Miller Foundation. Hugh died in 1962 and by his will exercised the power of appointment as indicated in the affidavit. Edna's estate claimed a marital deduction under section 2056 for the *entire corpus* of the forty percent share of her estate left to Hugh and an additional charitable deduction under section 2055(b)(2) for the remainder interest to charity agreed to in Hugh's affidavit.[5]

The Tax Court held that Edna's estate was entitled to both the charitable and marital deductions while Hugh's estate was not entitled to a charitable deduction although the forty percent interest in the trust property was includible in his gross estate under the provisions of section 2041.[6] In holding that Edna's estate was entitled to two deductions, the court placed emphasis on the fact that the literal language of both section 2055(b)(2) and 2056(b)(5) allowed the deductions and neither deduction precluded the other.[7] In regard to Hugh's estate, the Tax Court held that 2055(b)(2) precluded operation of 2055(b)(1) as to the same charitable contribution because the former was a "special rule" in contrast to

[3] 400 F.2d at 408.

[4] *Id.*

[5] *Id.* at 409-10.

[6] "(a) IN GENERAL.—The value of the gross estate shall include the value of all property—

. . . .

(2) POWERS CREATED AFTER OCTOBER 21, 1942.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment . . . such property would be includible in the decedent's gross estate under sections 2035 to 2038 inclusive. . . ." INT. REV. CODE of 1954, § 2041(a).

[7] Estate of Edna A. Miller, 48 T.C. 251, 264 (1967).

the latter being a "general rule"[8] and because the special rule depends upon the fulfillment of certain conditions, some of which depend on the affirmative acts of a person whose estate would otherwise be entitled to a charitable deduction under 2055(b)(1).[9]

The Third Circuit chose to follow the rationale of the Tax Court as to Edna's estate but overruled the Tax Court's opinion as to Hugh's estate. In basing its opinion upon the literal reading of 2055(b)(2) and 2056(b)(5), the court expressly held inapplicable to Edna's estate the "absurd results" and "double deduction" doctrines.[10] Additionally, the court refused to give weight to any of the several suggested alternative interpretations of section 2055(b)(2) on the grounds that the statutory language did not dictate one interpretation and that therefore the court should be reluctant to accept any one appropriate scheme.[11] In determining that Hugh's estate could claim a charitable deduction under 2055(b)(1) the court held that 2055(b)(2) and 2055(b)(1) were both special rules, that one could not preclude the other and that the two sections applied to the estates of different individuals which had no connection except the purely formalistic requirements of section 6503(e).[12]

The legislative framework involved in allocating the proper deductions to the estates of Hugh and Edna includes sections 2055 and 2056 of the Internal Revenue Code. In general, section 2055 allows, for property transferred to charity, a charitable deduction to the estate of the deceased in whose gross estate the property was includible. Section 2055(a) provides that the value of the gross estate shall be reduced by the amount of all bequests, legacies, devises or transfers to charitable organizations. This deduction also includes an interest which "falls into" such a bequest, legacy, devise, or transfer, by virtue of a disclaimer by the recipient of property from the deceased.[13] Likewise, section 2055(b)(1) allows a

[8] Estate of Hugh G. Miller, 48 T.C. 265, 269-70 (1967).

[9] *Id.* at 270.

[10] 400 F.2d at 411. For explanation of "absurd results" and "double deduction" doctrines see notes 22-23 *infra* and accompanying text.

[11] 400 F.2d at 411.

[12] *Id.* at 413. Amended in 1956 to correspond with the addition of 2055(b)(2), 6503(e) provides for an extension of the statute of limitations on the first decedent spouse's estate to thirty days after the filing of the surviving spouse's estate tax return when a deduction under 2055(b)(2) is claimed.

[13] INT. REV. CODE of 1954, § 2055(a). For a statement of the general rule of charitable deductions in estate taxation, see 4 MERTENS § 28.03.

deduction for property received by a charity which is includible in the decedent's gross estate under section 2041 by virtue of a general power of appointment.[14]

Section 2055 was amended in 1956 by the addition of 2055(b)(2).[15] This revision allows a charitable deduction, in the special situation set forth in that subsection,[16] to the estate of a decedent who leaves property in trust for a surviving spouse for life and gives the surviving spouse power to appoint the property by will in favor of charitable organizations, among others. As indicated in the Senate Finance Committee report, section 2055(b)(2) was to be applicable to "certain bequests in trust with respect to which no deduction is presently allowable."[17] The Committee report indicated additionally that the section was intended to allow a deduction in situations which were not covered by existing disclaimer provisions, such as a failure by the decedent to name a charitable organization as the taker in default.[18]

---

[14] INT. REV. CODE of 1954, § 2055(b)(1). According to 4 MERTENS § 28.10, allowance of a deduction for property received by charity where the property had been included in the taxpayer's estate because it was subject to a power of appointment is merely an extension of the general rule applicable to donations by the absolute owners of property since in both instances, he is treated as owner for the purposes of taxation of the estate. LOWNDES & KRAMER § 16.6, however, views section 2055(b)(1) as an exception to the general rule of 2055(b)(2). These authors apparently believe the general rule to be that the estate of the owner from whom title to property is deemed to have passed is provided with a charitable deduction. However, because the holder of a power of appointment does not have title according to property law, they consider that providing the holder with a charitable deduction is an exception to the general rule. These authors' statement of the general rule seems unjustified since inclusion of property in a decedent's gross estate, upon which the estate tax is imposed, is not based upon title concepts of property law, and under section 2041 the gross estate of a holder of a general power of appointment includes the property subject to that power. The MERTENS line of reasoning has found judicial acceptance. *See* Estate of William M. Lande, 21 T.C. 977, 989 (1954).

[15] INT. REV. CODE of 1954, § 2055(b)(2), *as amended* 70 Stat. 1075 (1956).

[16] A charitable deduction is available to the estate of the deceased spouse only if (1) no part of the corpus is distributed during the life of the surviving spouse, (2) the surviving spouse is eighty years old at the time of decedent's death, (3) the surviving spouse within one year of decedent's death executes an affidavit indicating an intention to appoint the trust property to qualified charities and indicates the amount each charity is to receive, and (4) later appoints the property as indicated in the affidavit. INT. REV. CODE of 1954, § 2055(b)(2).

[17] S. REP. No. 2798, 84th Cong., 2d Sess. 1 (1956).

[18] *Id.* The pertinent part of the Senate report stated: "This [charitable] deduction also is allowed if an interest passes to such an organization by reason of a disclaimer made before the date prescribed for the filing of the estate-tax return. In some instances, however, it is not feasible for a legatee to allow a bequest to pass to charity by disclaiming it. For example, in

Section 2056 governs the granting of marital deductions with 2056(b)(5) in particular providing for marital deductions where the property left to the surviving spouse consists of a life estate with a power of appointment exercisable at least in favor of the surviving spouse or the estate of the surviving spouse. As can be readily observed, the problem of one estate claiming both a marital deduction and a charitable deduction for the same interest in property would never have arisen before the 1956 amendment. Until that time every section 2056(b)(5) power was either disclaimed, and thus includible in the donor's estate but not allowed 2056(b)(5) treatment, or the power was a 2056(b)(5) power which was not disclaimed and thus not includible in the donor's estate.[19] Section 2055(b)(2) raised the possibility of property subject to a 2056(b)(5) power passing to the surviving spouse and thus qualifying for the marital deduction while at the same time being a basis for a charitable deduction from the donor's estate under section 2055(b)(2).[20] Further, the language of 2055(b)(2) raised the possibility of the same interest in property subject to a general power being the basis of charitable deductions to both the estate of the donor spouse and the estate of the donee spouse, if sections 2055(b)(1) and 2055(b)(2) were read literally. It was these possibilities which the Edna and Hugh Miller estates were to test.

After noting the absence of any prior decisions on section 2055(b)(2),[21] the court proceeded to consider the applicability of the doctrine of "absurd results" and the rule against double deductions. In holding inapplicable the principle that a literal interpretation should not be followed if it leads to absurd results, the court noted its inability to find:

---

the case of a bequest in trust where the income is payable to the surviving spouse of the decedent for life and the remainder to whomever the surviving spouse may appoint, the holder of the power of appointment could allow the property to pass to charity by disclaiming the power only if a charitable organization was named as the taker in default. This would be the result even if the donee is over eighty years old and has a relatively short life expectancy." *Id.*

[19] The power would qualify for marital deduction treatment under section 2056(b)(5) and be includible in the estate of the holder of the power under section 2041. See note 6 *supra.*

[20] The present case illustrates the mechanics of this literal reading. A marital deduction was allowed for the value of the *entire* trust corpus which passed to Hugh. A charitable deduction in the amount of the present value of the charitable remainder was also allowed. Thus, the present value of the charitable remainder was valued as part of the marital deduction and the whole of the charitable deduction.

[21] 400 F.2d at 410.

> information from any source showing the purpose of subsection 2055(b)(2), showing its intended interrelationship with the rest of the estate tax sections or showing that it can be analyzed for any of the familiar touchstones of interpretation such as evil remedied, object sought, etc.[22]

Viewing the rule against double deductions as a variation of the "absurd results" doctrine, the court held inapplicable this second interpretive tool on the grounds that there was no indication of congressional intent to disallow double deductions under 2055(b)(2). The court noted also that the double deductions rule had rarely been applied outside the income tax areas of consolidated returns and business losses and could not be used as a "legitimate canon of estate tax interpretation."[23]

The second major reason for the court's decision to read 2055(b)(2) literally in order to allow both a charitable deduction and a marital deduction to Edna's estate was its view that multiple interpretations would be possible if section 2055(b)(2) were to be read other than literally. The court indicated that these possibilities included restricting section 2055(b)(2) to cases of a transfer of a special power, restricting the section to circumstances in which a charitable deduction could not be obtained through a disclaimer, or limiting the section's application to transfers which exceeded fifty percent of the estate of the deceased spouse.[24] A further possibility suggested by the court is that Congress deliberately intended to allow both marital and charitable deductions for the same property.[25] After indicating the limitations of some of the possible interpretations,[26] the court concluded that because of the numerous

---

[22] *Id.* at 410-11.

[23] *Id.* at 411. In addition, the Third Circuit indicated that the doctrine of double deductions was inapplicable to the present case because with respect to one "doubling" two separate taxpayers were involved and because Congress had elsewhere acted explicitly to disallow double deductions under both section 642(g) and sections 2053 and 2054. *Id.* n.12.

[24] 400 F.2d at 411 n.13. Under section 2056 a marital deduction is available only to the extent of fifty percent of the estate of the deceased spouse. Limiting the application of 2055(b)(2) to property transferred to the surviving spouse in excess of fifty pereent of the donor's estate would eliminate marital and charitable deductions based on the same interest in property. The several restrictions on the applicability of section 2055(b)(2) considered by the court were suggested by the Commissioner. Brief for United States at 11, Estate of Miller v. Commissioner, 400 F.2d 407 (3d Cir. 1968).

[25] 400 F.2d at 412.

[26] *Id.* at 411 n.13. The court indicated that limiting application of section 2055(b)(2) to special powers, which would make the property transferred nondeductible under 2056, does

possible statutory schemes, courts should hesitate to adopt any of them as the only acceptable interpretation, particularly when the provisions of the section were available to only a few people due to the eighty year age requirement.[27]

In reversing the Tax Court's holding as to Hugh's estate and thereby allowing his estate a deduction under 2055(b)(1), the Third Circuit viewed the allowance of a charitable deduction under 2055(b)(2) to Edna's estate as not precluding a similar deduction to the estate of the surviving spouse under 2055(b)(1).[28] The court viewed the two sections as applicable to two different estates which had no connection except the requirements of section 6503(e).[29] In justifying its decision as to Hugh's estate, the Third Circuit refused to follow the Tax Court's rationale that the application of the "special rule" of section 2055(b)(2) to obtain a deduction precluded application of the "general rule" of section 2055(b)(1) to obtain an additional deduction for the same property contributed to charity. Instead, the court reasoned that this was not the case of the "specific" controlling the "general" provisions of a particular section because "both subsections of 2055(b) were quite specific, apparently dealing with narrow situations outside the 'general' tax rule of subsection 2055(a)."[30]

The *Miller* opinion stresses a literal approach rather than attempting to determine the intent of Congress in passing 2055(b)(2). Although this approach would suffice absent evidence of congressional intent, it is probable that the effect of 2055(b)(2) contemplated by Congress was different than that given to the section by the court. In holding inapplicable the "absurd results" rule and the similar doctrine against double deductions, the court was unable to determine any congressional purpose for section 2055(b)(2) or evidence of the evil sought to be remedied by the

not eliminate all double deductions because a power of appointment to a class excluding the decedent and his estate, but including the creditors of his estate, falls within 2041 and thereby qualifies for two charitable deductions, but outside 2056(b)(5). For the problems that the court found in giving 2055(b)(2) application to only the amount by which the property received by the surviving spouse exceeded the fifty percent limitation of 2055 see note 45 *infra* and accompanying text. For the difficulties that the court indicated in giving section 2055(b)(2) the effect of a disclaimer see note 51 *infra* and accompanying text.

[27] 400 F.2d at 412.

[28] *Id.* at 413.

[29] *Id.* For a discussion of the provisions of section 6503(e) see note 12 *supra.*

[30] 400 F.2d at 413. See note 14 *supra* and accompanying text.

section.[31] The Senate report on the section, however, indicates that it was to apply only when "no [other] deduction [was then] presently allowable."[32] Additionally, that report indicated that section 2055(b)(2) was intended to remedy inadequacies in the disclaimer provisions of 2055(a). The inadequacy indicated in the Senate report and on the floor of the House of Representatives was the failure of the deceased spouse to name the charitable organization in his will.[33] Such omission would have the effect of disallowing a charitable deduction to the estate of the decedent, because without a charity named in the will there could be no disclaimer to a charitable organization. A final indication of congressional intent is gathered from the single example used in the Senate report, that of an eighty year old surviving spouse with a *general* power of appointment as eligible to utilize the provisions of 2055(b)(2). If these evidences of congressional intent could be applied in a consistent manner in determining the effect to be given to section 2055(b)(2) on both the donor's and the donee's estates, the Third Circuit's dismissal of the "absurd results" doctrine would appear to be unjustified.

Two standards evolve from the above indications of congressional intent which could have been used in applying 2055(b)(2) to the estates of Edna and Hugh. First, the example of an eighty year old surviving spouse with a general power of appointment indicates that Congress did not intend to restrict the application of 2055(b)(2) to cases involving only a special power.[34] The second standard which emerges from the indications of congressional intent involves viewing section 2055(b)(2) as having the same effect as a disclaimer. Because the congressional motive in passing section 2055(b)(2) was to fill inadequacies in the disclaimer provisions,[35] it is probable Congress also contemplated that the effect

[31] See note 21 *supra* and accompanying text.

[32] S. REP. No. 2798, 84th Cong., 2d Sess. 1 (1956).

[33] *Id.*; 102 CONG. REC. 14295 (1956) (remarks of Representative Cooper).

[34] Although the *Miller* court spoke in terms of special power of appointment versus general power, the determinative consideration would appear to be whether the power at issue was a 2056(b)(5) power and thus includible in the donee's estate. The eighty year old surviving spouse with a general power example in the Senate report would indicate that section 2055(b)(2) was not intended to apply to only non-2056(b)(5) powers.

[35] Giving disclaimer treatment to section 2055(b)(2) becomes important in determining the validity of the court's conclusion that there were many possible schemes of interpreting 2055(b)(2) and that to choose any one scheme would be unjustified. See text accompanying note 48 *infra*.

of the new subsection would be the same as a disclaimer, which resulted in passing property to a charity under the decedent's will. In essence, the subsection could be looked upon as an extension of the disclaimer provisions[36] and has been so viewed in at least one commentary.[37] This interpretation is further supported by the language of section 2055(b)(2) that "such bequest in trust . . . [shall be] deemed a transfer to such organizations by the decedent." This language indicates that the donor decedent's charitable deduction results from a transfer of property directly to the charitable organization and not from a transfer to charity via the surviving spouse. Thus, as with a disclaimer, the property is viewed as passing from the original donor spouse rather than from the donee spouse. Application of disclaimer treatment to the power of appointment given by Edna to Hugh, which was the subject of Hugh's later affidavit and will, would result in a charitable deduction to Edna's estate but no marital deduction because the power of appointment left to the surviving spouse was in effect disclaimed and the resulting life estate would be a terminable interest which does not qualify for a marital deduction. Hugh's gross estate therefore could not claim a charitable deduction under 2055(b)(1). Since this interpretation of 2055(b)(2) could have been applied to the *Miller* estates consistently with the legislative history of that section, the rejection of the "absurd results" doctrine for lack of evidence of congressional intent appears to be invalid.

The refusal to apply the rule against double deductions to this case would also seem to be without merit. Application of an interpretive rule against allowing two estate tax deductions for a transfer of the same interest in property is justified not only by the legislative history of section 2055(b)(2),[38] but also by the interrelation of the marital and charitable deduction sections. The questions involved are whether both a charitable deduction and a marital deduction should be allowed to Edna's estate for the same interest in property and whether two charitable deductions

[36] See note 33 *supra* and accompanying text.

[37] Quiggle & Myers, *Tax Aspects of Charitable Contributions and Bequests by Individuals*, 28 FORD. L. REV. 579 (1959-1960). The relationship between disclaimers and section 2055(b)(2) can be seen by the statement that "[a] charitable deduction results from a disclaimer only if a charity is the taker in default. In 1956, Congress relaxed this rule in the case of a decedent who leaves property in trust for a surviving spouse of relatively short life expectancy." *Id.* at 609.

[38] See note 33 *supra* and accompanying text.

should be allowed for the same contribution to charity claimed by two different estates. Although the Third Circuit held the judicial doctrine against double deductions inapplicable to the estates of Edna and Hugh because cases have never before applied the double deduction rule to the estate tax area,[39] justification for applying the rule to marital and charitable deductions can be derived from the statutory scheme of the sections involved. Before the addition of section 2055(b)(2) it was not possible for one estate to obtain both a marital and charitable deduction for the same interest in property.[40] Likewise, no single contribution to charity could be the source of two charitable deductions. The charitable deduction was available only to the estate from which it was deemed to have passed, either by direct transfer or as a result of disclaimer. Since the same interest in property was not includible in two gross estates, it could not give rise to two charitable deductions. In view of this past treatment of charitable deductions and marital deductions, a legislative standard denying not only a charitable deduction and a marital deduction for a transfer of the same interest in property but also denying two charitable deductions for the same contribution to charity existed at the time of the passage of the 1956 amendment, which added section 2055(b)(2).

The crucial point of the Third Circuit's decision involved its view that in applying section 2055(b)(2) to the estates of Edna and Hugh, any attempt to interpret section 2055(b)(2) would lead to many possible interpretations and that the court would not be justified in selecting any particular one.[41] This approach would be valid were it not possible to deduce from the legislative history an interpretation that is consistent both with that history and with the general statutory scheme of charitable deductions.[42] The possible solutions considered by the court lack such consistency. The theory of restricting section 2055(b)(2) to special powers is inconsistent with the example of a general power used in the Senate report and in the discussion of the bill in the House of Representatives.[43] Further, if 2055(b)(2) pertained only to special powers it would not

[39] 400 F.2d at 411.

[40] See note 19 *supra* and accompanying text.

[41] 400 F.2d at 411.

[42] See notes 33 & 35 *supra* and accompanying text.

[43] S. REP. No. 2798, 84th Cong., 2d Sess. 1 (1956); 102 CONG. REC. 14295 (1956) (remarks of Representative Cooper).

be a "special rule" to section 2055(b)(1) because that section applies only to general powers.[44] Therefore, it must be that section 2055(b)(2) also applies to general powers.

A second possible scheme considered by the court, that of interpreting section 2055(b)(2) as applicable to transfers to a surviving spouse only when the property transferred exceeded fifty percent of the estate of the deceased spouse, is likewise without support. As indicated by the Third Circuit, this restriction appears to be merely another scheme which can be hypothesized but about which Congress has mentioned nothing.[45] The Commissioner supported this fifty percent restriction on the ground that the phrase "no other deduction presently allowable" indicates an intent to preclude operation of section 2055(b)(2) when a marital deduction was available for the property,[46] which proscription would be lifted only when the amount of property transferred to the surviving spouse exceeded fifty percent of the decedent's gross estate.[47] However, since Congress intended to give section 2055(b)(2) the effect of a disclaimer as suggested above,[48] the transfer to charity would be directly from the donor spouse and thus no marital deduction would be available for the property. It would be unreasonable to construe section 2055(b)(2) as operable only when the property constituted more than fifty percent of the donor's gross estate since in no case, let alone the limited case suggested by the Commissioner, would a marital deduction be available for the property. Given this meaning, there is no legislative language to support restricting the applicability of the section to marital transfers which exceed fifty percent of the donor's estate.

[44] INT. REV. CODE of 1954, §§ 2055(b)(1)-(2). For the view that section 2055(b)(2) is a special rule as compared to the general rule reflected in section 2055(b)(1), see notes 58-59 *infra* and accompanying text.

[45] 400 F.2d at 411 n.13.

[46] Brief for Appellee at 16, Estate of Miller v. Commissioner, 400 F.2d 407 (3d Cir. 1968).

[47] INT. REV. CODE of 1954, § 2056(c)(1).

[48] See notes 35-37 *supra* and accompanying text. To the extent, however, that local law allows a disclaimer of part of the property received by the donee, and if the Commissioner and the courts were to uphold such partial disclaimers, the language "no other deduction presently allowable" could be interpreted as applying to cases in which a marital deduction was allowable but in which greater than fifty percent of the decedent spouse's estate was originally received by the surviving spouse. The marital deduction would be available since the surviving spouse could retain part of the property, while disclaiming the rest. For a discussion of the validity of partial disclaimers, see LOWNDES & KRAMER § 16.60.

Another possible application of section 2055(b)(2) to the facts of *Miller* involves a literal interpretation and consequent double deductions which the court chose to follow.[49] Although the court's interpretation is consistent with the language of section 2055(b)(2), it fails to give effect to congressional intent set forth in the legislative history of the section. The court's opinion and interpretation give no effect to the "no other deduction presently allowable" phrase contained in the Senate report, other than to cite it in a note.[50] Nor does the court give any effect to the Senate report's indication that the objective of the section was to fill what Congress considered an inadequacy in the disclaimer provisions of section 2055(a). Presumably the court's reason for refusing to give such recognition was contained in a note to the effect that if the object of the section were to remedy disclaimer inadequacies, it failed to do so because the inability of the deceased to obtain a charitable deduction if no charitable organization was named in the grantor's will as a taker in default was only one of the "tax art" problems of section 2055(a).[51] However, this reason for not giving the disclaimer analogy any effect is not convincing since a failure to fill all disclaimer inadequacies does not negate an intent to fill at least one. Because Congress was concerned with disclaimer inadequacies, it is probable that section 2055(b)(2) was intended to merely extend the disclaimer provisions to the special circumstances set forth in 2055(b)(2). However, it must be noted that this probable congressional intent is less than clear in the language of the section.

As indicated previously, a plausible interpretation of section 2055(b)(2) which gives effect to the probable intent of Congress, is to view the section as an exception to the ordinary treatment of a general power of appointment and an extension of the disclaimer treatment.[52] This approach would have the effect of giving Edna Miller a charitable deduction for the remainder interest that Hugh appointed to the charitable organization but no marital deduction. This is not a harsh result, since, as compared to pre-1956 law, the donor would have a charitable deduction which extends to all of the

[49] 400 F.2d at 413.
[50] *Id.* at 411 n.13.
[51] *Id.*
[52] See text accompanying note 35 *supra.*

interest that goes to charity rather than merely a marital deduction which is limited to fifty percent of the decedent's gross estate.

In summary, it seems that the court's decision to read section 2055(b)(2) literally and to grant both a charitable and marital deduction to Edna's estate is questionable in that no attempt was made to determine and apply the intent of Congress. Furthermore, it appears that interpreting section 2055(b)(2) as having the effect of a disclaimer does manifest the intent of Congress and is consistent with the legislative rationale of charitable and marital deductions.

As in determining deductions available for Edna's estate, the use of a literal approach in determining Hugh's estate taxes creates a questionable result. The interpretation given by the court to section 2055(b)(2) and the interplay between section 2055(b)(1) and 2055(b)(2) led the court to the conclusion that the trust corpus was fully taxable to Hugh under section 2041 and that a charitable deduction was available to Hugh's estate under section 2055(b)(1).[53] To reach this result the court was forced to conclude not only that there was no connection between the estates of Edna and Hugh other than "the bookkeeping provisions of requirement (D), § 6503(e),"[54] but also that a deduction under section 2055(b)(2) did not preclude a deduction under section 2055(b)(1). As the Tax Court indicated, however, these observations do not appear to be correct.[55] The connection between Edna's estate and Hugh's estate exists not only because both estates claim a charitable deduction for the same contribution received by charity but also because Hugh filed an affidavit under section 2055(b)(2) indicating his intent to create the conditions necessary for Edna's estate to obtain a charitable deduction.[56] It appears unreasonable to award Hugh's estate a charitable deduction because he has carried out the acts agreed to in an affidavit through which he manifested an intent that Edna's estate obtain the charitable deduction.

In finding a lack of preclusive interplay between sections 2055(b)(1) and 2055(b)(2) the court held inapplicable the canon of construction that use of a "special rule" tends to indicate that

[53] 400 F.2d at 413.

[54] *Id.*

[55] Estate of Hugh G. Miller, 48 T.C. 265, 270 (1967).

[56] The affidavit was filed pursuant to the requirements of INT. REV. CODE of 1954, § 2055(b)(2)(C).

application of the "general rule" is prevented. In disagreeing with the Tax Court, the Third Circuit held that both section 2055(b)(1) and 2055(b)(2) were specific and dealt with narrow tax situations outside the "general" tax rule of subsection 2055(a).[57] This analysis fails to state correctly the general rule applicable to charitable deductions, which appears to be that a deduction is allowable from the gross estate of a decedent for the value of property included in his gross estate and transferred to charitable organizations by him, including amounts deemed to have been transferred by him as a result of an irrevocable disclaimer.[58] Section 2055(a) implements this general rule by giving a charitable deduction to the estate of an individual whose gross estate included the property and who transferred the property to charity directly or is deemed to have transferred it due to a disclaimer by the donee of the interest. Likewise, section 2055(b)(1) implements the general charitable deduction rule because it gives the deduction to the person in whose gross estate the property is includible. For estate tax purposes, property subject to a general power of appointment is included in the gross estate of the donee of the power. Section 2055(b)(2), however, is a clear exception to this general rule. By virtue of both the statutory language and its legislative history the section applies to general powers of appointment; but rather than give the charitable deduction to the donee, it gives the charitable deduction to the donor of the general power. Therefore, it appears that section 2055(b)(2) is a special rule whereas section 2055(b)(1) is merely an application of the general rule. As a result, the court could have applied the judicial canon of interpretation that the use of a special rule precludes use of the general rule.[59] This would have the effect of disallowing a charitable deduction to Hugh's estate because 2055(b)(1) would not be available for use.

The more reasonable application of section 2055(b)(1) and 2055(b)(2) to Hugh's estate would hold that the remainder interest appointed to charity by Hugh would neither be includible in his estate nor would it obtain a charitable deduction under section 2055(b)(1).[60] This results from treating property appointed pursuant

[57] 400 F.2d at 413.

[58] See note 13 *supra* and accompanying text.

[59] *See* Essenfeld v. Commissioner, 311 F.2d 208, 210 (2d Cir. 1962).

[60] See text following note 33 *supra*.

to the specific requirements set forth in section 2055(b)(2) as if it were disclaimed. Disclaimed property is not includible in the disclaimant's gross estate pursuant to the terms of section 2041(a)(2) since a disclaimer amounts to a total rejection of the power of appointment.[61] Further, since a charitable deduction under section 2055(b)(1) is premised upon a general power of appointment includible in the decedent's gross estate, Hugh's estate would not qualify for such a charitable deduction.

The Third Circuit's opinion in *Miller* has two implications. The first pertains to the passage of "special legislation" while the second concerns the clarification of the intended effect of 2055(b)(2). The court's characterization of section 2055(b)(2) as "special legislation," created for the convenience of a special case, is supported by both commentators[62] and the legislative history. The emphasis in the Senate report and on the floor of the House of Representatives on remedying inadequacies in the disclaimer provisions, the very specific requirements of section 2055(b)(2) and the retroactive effect given to the section all indicate that Congress was concerned with a special fact situation. The particular case probably involved a transfer to a spouse of a life estate and a power of appointment in an amount greater than fifty percent of the decedent's gross estate with a remainder to an unnamed charity to be designated by the surviving spouse.[63] It is evident from the result reached in *Miller* that before adopting legislation to rectify inadequacies in existing laws, Congress should consider with particular care the language used and its effect on other fact situations. Furthermore, as the *Miller* opinion indicates, it is desirable that Congress make clear the intended effect of the language used to correct the inadequacy.

Although interpreting the 2055(b)(2) power of appointment as equivalent to a disclaimer appears to be the most reasonable

[61] INT. REV. CODE of 1954, § 2041(a)(2).

[62] *See, e.g.*, 4 MERTENS § 28.06 n.17; 4 J. RABKIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 59.08 (1969); P. STERN, THE GREAT TREASURY RAID 46, 49-50, 292 (1964); Rudick & Gray, *Bounty Twice Blessed: Tax Consequences of Gifts of Property to or in Trust for Charity*, 16 TAX L. REV. 273, 304 n.120 (1961).

[63] In this case 2055(b)(2), if given disclaimer treatment, would provide a greater deduction from the decedent donor's estate than was available before 1956 by allowing a charitable deduction for the amount appointed by the surviving spouse to charity. This amount would be either all of the property received by the surviving spouse or the amount by which the property exceeded fifty percent of the donor's estate, if partial disclaimers were allowed.

treatment of the subsection and is consistent with the very small amount of legislative history on the subsection, it is not certain that this interpretation is what Congress intended. Further, the statutory language itself provides little indication to the taxpayer that the power of appointment will be treated as disclaimed for purposes of determining the tax liability of the estate of the surviving spouse. If the interpretation of section 2055(b)(2) suggested throughout this article is acceptable, Congress could easily clarify the section by indicating that for purposes of determining the tax liability of the estate of the surviving spouse the effect of his executing the affidavit required by section 2055(b)(2)(C) will be the same as a disclaimer under section 2055(a). Absent such clarifying language, the Third Circuit's decision in *Miller* has the appeal of a certain rough justice. Congress has permitted the situation to arise by the enactment of special legislation, and it seems only fair that a tax benefit in a statute of general application be available to those who satisfy the requirements.