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ESTATE TAX: UNITED STATES v. JACOBS—PETITION FOR LEGISLATIVE REVIEW

Obvious death tax significance can be found in the common arrangements for the joint ownership of property, such as joint tenancy, tenancy by the entirety, and joint bank account, because of the right possessed by each joint owner to take the whole property by survivorship.

The property concept of the transfer to one joint tenant by right of survivorship classifies the surviving tenant's interest as one which vested upon the creation of the joint tenancy. On the basis of this, it has been contended that there was no "taxable transfer" taking effect at the co-tenant's death. However, the United States Supreme Court said in *Tyler v. United States,* 281 U. S. 497 (1930) "At . . . [the co-tenant's] death . . . and because of it . . . [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment. . . . Thus, the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other." This departure from the common law was further amplified in *United States v. Jacobs,*[1] in which the court stated that the power of Congress to levy taxes was not to be determined by "shadowy and intricate distinctions of common law property concepts and ancient fictions." The Supreme Court, in the *Tyler* case, stated (p. 503) that the true basis for taxation is the ripening or bringing into being of property rights of the survivor as a result of the death of the co-tenant, of such a nature and character as to make the imposition of a tax on that result appropriate, and not the existence of a "transfer" of the property by the death of the decedent nor receipt of it by right of succession. Congress has designated this change in the nature of the ownership as a proper occasion for the imposition of a tax by § 811(e) of the Internal Revenue Code.

In the *Jacobs* case the Court recognized the existence of marked differences between a joint tenancy and a tenancy by the entirety, but was of the view that there was a sufficient similarity between the two estates for them to have been treated alike for purposes of taxation. In reaching this result, the Court relied on 1 TIFFANY REAL PROPERTY § 194 (1920), in which it is

1. 306 U.S. 363 (1939), reversing 97 F.2d 784 (7th Cir. 1938), *motion to set aside judgment denied* 306 U.S. 620 (1939).

said that a tenancy by the entirety is merely a modified joint tenancy, and distinguished from a joint tenancy only in that in the latter the husband and wife are treated as one person.

This problem of jointly owned property has been met by express statutory provision in a few states. Code of Virginia § 58-152 (1950) imposes an inheritance tax upon the shares of the beneficiaries which pass by virtue of the fact that the property was held by the decedent and another as joint tenants with right of survivorship, excepting from the operation of the statute that part of the property which is shown to have originally belonged to the co-tenant other than the decedent and never acquired from the decedent for less than an adequate and full consideration. The Virginia statute is essentially the same as § 811(e).

It should be noted that provisions of § 811(e) and Virginia's § 58-152 have more limited application in this state by reason of another statutory provision which abolishes survivorship in joint tenancies in Virginia except for co-trustees, co-executors, and where the instrument creating the tenancy expressly provides for survivorship.[2]

Joint tenancies and tenancies by the entirety, save in these statutory exceptions, are converted into tenancies in common by operation of law. § 811(e) does not apply to tenancies in common, so that only the decedent's pro rata interest in the property is included in his gross estate.[3] State property laws determine the type of ownership which the co-tenants possess.[4] The question as to whether the property is held jointly or in some other form of co-tenancy depends, generally speaking, upon the intent of the parties and the effect of the laws of the jurisdiction in which the tenancy is created.[5]

The federal provision regarding joint tenancies has been in the law since 1916. § 811(e) levies the tax on joint interests regardless of when the interests were created, as long as death has taken

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2. VA. CODE ANN. §§ 55-20, 55-21 (1950).
3. U. S. Treas. Reg. 105 § 81.22; Merry M. Dennis 3 P-H 1952 Fed. Tax Serv. Par. 23, 743 (B.T.A. 1932).
4. Hoxie v. Page, 23 F. Supp. 905 (D.R.I. 1938), *aff'd* 104 F.2d 918 (1st Cir. 1939).
5. Helvering v. Miller, 75 F.2d 474 (2nd Cir. 1935); Hoxie v. Page, *supra;* Estate of Irwin A. Smith, 45 B.T.A. 59 (1941); *cf* Robinson v. Comm'r., 63 F.2d 652 (6th Cir. 1933), *cert. denied* 289 U.S. 758 (1933); Estate of Julian Peabody, 41 B.T.A. 1 (1940); Estate of Joseph A. Bruderman, 10 T.C. 560 (1948); Thomas R. Tennant Est., P-H T.C. Mem. Dec. Serv. Par. 49,040, CCH 1949 Fed. Tax Rep. Par. 16,839.

place since the enactment of the statute; and tenancies by the entirety are also taxed under § 811(e) because of the feature of "survivor take all." The entire value of the property is taxed to the decedent unless in tracing the funds it is clearly proven that the survivor made some contribution and that such contribution did not originate from the decedent without any consideration, in money or money's worth having been given for it by the survivor. It is the present rule that the full value of the property held jointly is included in the gross estate in the absence of proof of contribution on the part of the surviving tenant.

In *Gwinn v. Commissioner,* 287 U. S. 224 (1932) decedent and her son acquired certain property by equal contribution as joint tenants with right of survivorship, which they continued to hold until the death of the decedent. The value of one-half of the property was held properly included in determining the value of the decedent's gross estate.[6] Where death has occurred subsequent to the 1924 Act[7] property held jointly or by the entirety is taxable to the extent of the decedent's contribution, regardless of date of creation of the estate. The entire value of personal property held by the decedent and his wife in joint tenancy (a portion of which property had been contributed by the wife from property previously transferred to her by the decedent without consideration) was constitutionally includible in the decedent's gross estate.[8] But where the property itself was owned by the survivor prior to its conversion into a tenancy by the entirety, it has been held that no part of the property is subject to tax, notwithstanding that the purchase price had been paid by the decedent.[9] Under similar circumstances, the entire property has been included in the estate.[10] If the husband makes a gift to the wife and she subsequently creates a joint tenancy before predeceasing her husband, no part of the property is ordinarily includible in *her* estate. (The Tax Court has stated that she is taxable in such case if her creation of the joint tenancy was in contemplation of death.)[11] But, neither a reversionary interest nor a power of revocation may justify the tax because the "original ownership" provision of § 811(e) overrides the provisions of

6. *Accord*: Bushman v. United States, 80 Ct. Cl. 175, 8 F. Supp. 694 (1934), *cert. denied* May 27, 1935; Tyler v. U. S. *supra.*
7. § 301 Act of 1924, 43 STAT. 303 (1924).
8. United States v. Jacobs, *supra.*
9. McCrady v. Heiner, 19 F. Supp. 575 (W. D. Pa. 1937).
10. Stuart v. Hasset, 41 F. Supp. 905 (D. Mass. 1941); *see* Horner Estate v. Comm'r., 130 F.2d 649 (3rd Cir. 1942).
11. Nathalie Koussevitsky Estate, 5 T.C. 650 (1945).

§§ 811(c) and 811(d).[12] It should be noted that despite his original gift to his wife, if the husband died first the entire property would have probably have been included in his estate.

In *United States v. Jacobs, supra,* it was argued that § 811(e) should not be applied retroactively in the case of joint tenancies created prior to 1916. Taxpayer asked the Court to distinguish in this respect between joint tenancies and tenancies by the entirety, on the basis that the former interests are alienable at the election of the joint tenant, whereas the latter interests cannot be severed or disposed of except with the consent of both tenants. Thus, it was the taxpayer's contention that since the joint tenant had present control over the disposition of his interest, the concept of survivorship should not determine the estate tax consequences, as in the case of the tenancy by the entirety in which the consent of the creator of the interests is required. The Court rejected these distinctions on the theory already mentioned above. It is not the purpose of this note to question the equities of the Court's determination, but rather to point out the inconsistencies that now exist, resulting from the views taken by Congress, as evidenced by the recent change made in § 811(c). It seems apparent that Congress itself has adopted the position maintained by the taxpayer in the *Jacobs* case, at least with respect to transfers intended to take effect at or after death, and it seems somewhat strange that commensurate change has not been made in the application of § 811(e) under irreconcilable circumstances.

Under § 811(c)(3), any interest in property transferred by the decedent after October 7, 1949 is included in his gross estate under 811(c)(1)(C) if, and only if, possession or enjoyment of the property through ownership of such interest can only be obtained through surviving the decedent or by surviving the earlier to occur of the decedent's death or some other event which is provided in the terms of the transfer, which event does not in fact occur during the decedent's lifetime. Thus, again, the condition of survivorship is the controlling factor. At this point, the applications of the two are not greatly dissimilar. However, within § 811(c)(3) it is also provided that, notwithstanding the provisions as to survivorship, if possession or enjoyment of the property could have been obtained by a beneficiary during the decedent's lifetime through the exercise of a general power of appointment

12. 2 Rabkin and Johnson, FEDERAL INCOME, GIFT AND ESTATE TAXATION (1951 Supplement) § 52.06.

which power was in fact exercisable immediately prior to the decedent's death, then such interest transferred is not includible in the decedent's gross estate. It is this portion of § 811(c)(3) which brings about the inconsistencies aforementioned.

The inconsistencies of the situation may be made more apparent by an application of both statutes to a similar set of facts:

(1) F, the father, is the owner of a certain piece of property in which he wants to give his son, S, a joint interest with himself, S to receive the entire property in the event that he, S, survives F. F transfers the property to F and S as joint tenants with right of survivorship. S has made no contribution. Upon F's death the *entire* value of the property is included in F's gross estate in computing his estate tax.

(2) If F transfers to S an estate for the life of F, the entire fee to vest in S in the event he survives F, and, in addition, places in S a general power of appointment exercisable by S during the of F, then the transfer falls within the exception in 811(c)(3), and no part of the interest so transferred is included in F's gross estate upon his death.

In (1) above, the entire property vests in S if he survives F. During F's lifetime, the period of the joint tenancy, S could, as a joint tenant, destroy, transfer or encumber his interest. Yet, if upon F's death, no contribution on the part of S is shown, then the entire value of the property is included in F's gross estate. However, under (2) above, notwithstanding the conspicuous similarities between the rights of S here and the rights of S under (1), no part of the interest transferred is included in F's gross estate. Here we find, as in (1), that the entire interest will vest in S upon the death of F by right of survivorship. Here S may obtain the property by surviving F or it may be obtained by his appointing it to himself during F's lifetime. In both (1) and (2) S in reality has but a life estate, since if, in (1) S does not survive F the estate vests in F, and in (2) if S does not survive F or exercise the power of appointment during his lifetime, then the entire estate again vests in F. Merely by placing in S a general power to appoint the property, F has withdrawn the transfer from the operation of 811 (e) and placed it within the more beneficial provisions of 811(c)(3).

It is true that with the general power of appointment, S may, by its exercise, appropriate the fee interest in the whole of the property, while under the joint tenancy he may alienate only his joint interest. And, depending upon the nature of the property, the value of the whole may be considerably greater than twice the value of a half interest. Although this is a distinction of substance, is it sufficient to justify the taxing of the whole of the property in the latter instance and no part whatsoever in the former? Certainly, with respect to S's joint interest he has as much control over its present disposition without regard to survivorship of F as he has with respect to a commensurate share of the whole property over which he has the general power of appointment. It is clearly the element of control in the donee which has motivated Congress to except from the application of § 811(c) the value of properties so transferred.

Notwithstanding the disregard by the courts of the common law property concepts which would prevent taxation, it is still possible to avoid taxation and at the same time have the property vest in the son as it would under the survivorship rights in a joint tenancy, in which case it would be taxable. The necessary result under the joint tenancy would be the inclusion of the entire property in the decedent's gross estate, unless the surviving tenant had given some valuable and actual consideration for his interest, whereas, under 811(c)(3), property transferred to the son with a general power in him to appoint, would not be includible in the decedent's gross estate, notwithstanding the survivor's having given no consideration.

The reasoning of the courts, and the enactment by Congress, may be sound with respect to joint interests as regards the preventing of tax evasion and the basic need for the removal of the common law distinctions between the various types of estates. However, the reasons for the resulting distinctions between a joint tenancy and a power of appointment are not quite as apparent. Perhaps Congress and the courts have applied sound reasoning in maintaining these distinctions, which appear to be arbitrarily inconsistent. Perhaps this distinction was considered by Congress when 811 (c) was changed; or it is possible that the situation has been inadvertently overlooked by Congress. Whatever might be the reason for the variance between 811(e) and 811(c)(3), a need for a change seems apparent. Despite the concern of the *Jacobs* decision with the retroactive rather than prospective application of 811(e), the arguments advanced by the taxpayer in that case seem to be particularly pertinent now in view of the 811(c)(3) legislation, and might be re-examined, not by the courts, but by Congress, towards the need to remedy the inconsistency in the two statutes.

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