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CURRENT DECISIONS

Federal Estate Taxation—CHARITABLE TRANSFERS—DEDUCTIBILITY OF CERTAIN BEQUESTS. In her will Edna Miller created a trust, the income of which was to be paid to her husband, Hugh, for life with the power in him to appoint the remainder by will. If Hugh died without exercising this power of appointment, the income from the trust was to be paid to their son for life with the remainder to a qualified exempt charity[1] on the latter's death. Edna died, survived by a son and Hugh, who was eighty-four years old. Edna's estate claimed a marital deduction for the value of the trust corpus under section 2056[2] and a charitable deduction for the value of the remainder interest appointed to charity under section 2055(b)(2).[3] Hugh executed and filed with his wife's return the necessary affidavit under section 2055(b)(2).[4] At his death he exercised the power by appointing the income of the trust to his son for life, with the remainder to a qualified exempt charity,[5] all in accordance with the specifications set forth in the affidavit. Hugh's estate tax return included the trust assets in his gross estate as required by section 2041[6] and claimed a charitable deduction for the remainder interest appointed to charity under section 2055(b)(1).[7]

The Tax Court held that Edna's estate was entitled to both the charitable and the marital deductions on the ground that section 2055(b)(2) was not intended to preclude the availability of a marital deduction under section 2056(b)(5)[8] and thus both were allowable.[9] It then held that Hugh's estate must include, under section 2041,[10] the assets received from Edna over which he had a general testamentary power of appointment, but that his estate was not entitled, under section 2055(b)(1), to any deduction for the remainder appointed to

1. As defined in INT. REV. CODE OF 1954, § 2055(a)(2).
2. *Id.* at § 2056.
3. *Id.* at § 2055(b)(2).
4. *Id.*
5. *Id.* at § 2055.
6. *Id.* at § 2041.
7. *Id.* at § 2055(b)(1).
8. *Id.* at § 2056(b)(5).
9. Estate of Edna Allen Miller, 48 T.C. 251, 252 (1967).
10. INT. REV. CODE OF 1954, § 2041.

charity on the ground that 2055(b)(2) is an exception to 2055(b)(1) and precludes the application under these circumstances of the latter section to the same transfer.[11] The Third Circuit Court of Appeals in *Miller v. Commissioner*[12] sustained the Tax Court's decision in *Estate of Edna Allen Miller* but reversed the decision in *Estate of Hugh Gordon Miller*. It held that Hugh's estate was entitled to a deduction for the remainder appointed to charity on the ground that 2055(b)(1)[13] was applicable since 2055(b)(1) and (b)(2) refer to deductions for two separate decedents.[14]

For a proper understanding of the issues involved it is necessary to consider briefly the applicable statutory provisions. Under section 2056(b)(5),[15] the marital deduction is available where the property is left in trust with the income for life to the surviving spouse who has been given a general power of appointment over the remainder. Under section 2055(b)(1),[16] where property, included in the gross estate

11. Estate of Hugh Gordon Miller, 48 T.C. 265 (1967).

12. Miller v. Commissioner, — F.2d — (3d Cir. 1968) *reported in* 2 CCH FED. EST. & GIFT TAX REP. (68-2 U.S. Tax Cas.) ¶12,551 at 8783. Estate of Edna Allen Miller, 48 T.C. 251 (1967) and Estate of Hugh Gordon Miller, 48 T.C. 265 (1967) were consolidated and heard together in Miller v. Commissioner, — F.2d — (3d Cir. 1968).

13. INT. REV. CODE OF 1954, § 2055(b)(1).

14. Miller v. Commissioner, — F.2d — (3d Cir. 1968) *reported in* 2 CCH FED. EST. & GIFT TAX REP. (68-2 U.S. Tax Cas.) ¶12,551 at 8783.

15. INT. REV. CODE OF 1954, § 2056(b)(5) provides:

> (5) LIFE ESTATE WITH POWER OF APPOINTMENT IN SURVIVING SPOUSE.— In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
>
> (A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
>
> (B) no part of the interest so passing shall, for purposes of paragrah (1)(A), be considered as passing to any person other than the surviving spouse.
>
> This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

16. *Id.* at § 2055(b)(1) provides:

> (b) [as amended by P.L. 1011, 84th Congress, effective as to estates of decedents dying after August 16, 1954.] POWERS OF APPOINTMENT.—

of a decedent because he has been given a general power of appointment over it under section 2041,[17] goes to a qualified charity through the exercise of this power, it is treated as a charitable bequest and is available for an estate tax charitable deduction. Under 2055(b)(2),[18] where a decedent makes a bequest in trust with the income for life to the surviving spouse who has also been given a testamentary power of appointment over the remainder, a charitable deduction, reduced by the value of the life estate, is allowed the decedent's estate if all the following four conditions are met:

(1) The surviving spouse is over eighty years of age at the date of decedent's death.

(2) The surviving spouse, within one year of decedent's death, executes an affidavit naming the qualified charities in whose favor he intends to exercise his power of appointment and such affidavit is attached to decedent's estate tax return.

(3) The power of appointment is exercised in accordance with the affidavit.

(4) No part of the trust corpus is distributed to a beneficiary during the surviving spouse's life.

The chief problem here concerns section 2055(b)(2) and its interaction with sections 2056, 2041, and 2055(b)(1). Section 2055(b)(2), enacted in 1956, has been described as a "crassly conceived and crudely drawn statute" resulting in "many unsettled questions for the few taxpayers to whom it may apply." [19] Some commentators believe that the difficulties created by the section derive from the fact that it was apparently a "private relief measure" and in view of its retroactive application must be regarded as "special legislation." [20] The legislative

(1) GENERAL RULE. Property includible in the decedent's gross estate under section 2041 (relating to powers of appointment) received by a donee described in this section shall, for purposes of this section, be considered a bequest of such decedent.

17. *Id.* at § 2041, which in general relates to powers of appointment.

18. *Id.* at § 2055(b)(2), the main provisions of which are set out in the text, *infra*, at this footnote.

19. 4 J. RABKIN & M. JOHNSON, FEDERAL INCOME, GIFT AND ESTATE TAXATION § 59.08(9) (1968).

20. *Id.* at § 59.08; 4 J. MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION § 28.06 n. 17 (1959); Rudnik & Gray, *Bounty Twice Blessed: Tax Consequences of Gifts of Property to or in Trust for Charity*, 16 TAX L. REV. 273, 304 n. 120 (1960).

history of the section provides little or no guidance in determining congressional intent underlying passage of the section.[21] The purported purpose of the bill as stated by the committee reports "is to allow a deduction for estate-tax purposes in the case of certain bequests in trust with respect to which no deduction is presently allowable." [22] This is the first decision dealing with section 2055(b)(2) and its interrelationship with sections 2056, 2041, and 2055(b)(1).[23]

In the Tax Court, the Commissioner of Internal Revenue contended that Edna's estate should not be permitted the charitable deduction as this would allow a double deduction on the same item, would be "adverse to the revenue," and was not in the contemplation of Congress when it enacted section 2055(b)(2).[24] The Commissioner further argued that if the charitable deduction were allowed, the value of the charitable bequest should be deemed to pass to Hugh under section 2056(b)(5)[25] and therefore should not be available as a marital deduction.[26] As to the Commissioner's first contention, the Tax Court held that 2055(b)(2) was not intended by Congress to preclude the availability of a marital deduction under section 2056(b)(5) and both were allowable here.[27] The Tax Court rejected the Commissioner's other argument on the ground that there was no "evidence aliunde the pertinent section of the Internal Revenue Code that Congress did *not* intend them [*i.e.*, the Code provisions] to mean what they say." [28] The Tax Court further stated that "if the taxpayer has found a hole in the dike of the Internal Revenue Code, it is 'one that calls for the application of the Congressional thumb, not the Court's'." [29] Thus the Tax Court allowed Edna's estate a double deduction for the identical sum. The Court of Appeals for the Third Circuit agreed, stating that "the

21. S. REP. No. 2798, 84th Cong., 2d Sess., U.S. CODE CONG. & ADMIN. NEWS 4456 (1956).

22. *Id.*

23. Miller v. Commissioners, — F.2d — (3d Cir. 1968) *reported in* 2 CCH FED. EST. & GIFT TAX REP. (68-2 U.S. Tax Cas.) ¶ 12,551 at 8783. In the words of the Third Circuit, "Neither counsel for the parties nor the courts have been able to discover a prior decision dealing with § 2055(b)(2) or any other decisions sufficiently related to the problem posed to provide authoritative guidance." *Id.* at 8785.

24. Estate of Edna Allen Miller, 48 T.C. 251, 252 (1967).

25. *Id.*

26. *Id.*

27. *Id.* at 259-261.

28. *Id.* at 264.

29. *Id.*

courts have no choice in this case other than to apply subsection 2055 (b)(2) literally as it is worded." [30]

As to Hugh's estate the Commissioner contended that it must include, under section 2041,[31] the assets received from Edna over which Hugh had a general testamentary power of appointment but that it was not entitled, under section 2055(b)(1), to any deduction for the remainder appointed to charity. The Tax Court sustained the Commissioner on both points.[32] As to the first contention, the Tax Court held that section 2041 was applicable in that "section 2055(b)(2) is relevant only to deductions from and not inclusions in the gross estate of a decedent." [33] As to the second point, the Court said that section 2055 (b)(2) was an exception to section 2055(b)(1) and, "when properly applied . . . precludes the application of section 2055(b)(1) to the same transfer." [34] The Third Circuit Court of Appeals disagreed, stating that Hugh's estate was entitled to a deduction for the remainder appointed to charity as the application of section 2055(b)(2) to Edna's estate did not preclude the use of 2055(b)(1) in Hugh's since both subsections of 2055(b) "apparently" deal "with narrow situations outside the 'general' tax rule of subsection 2055(a)" [35] and because the phrase "for purposes of this section" appearing in both subsections "indicates . . . that (b)(2) is in addition to (b)(1)—an item of special legislation for certain octogenarians." [36]

Thus the unfortunate decision rendered by the Court of Appeals[37] allows the same item a triple deduction—a charitable and marital deduction to Edna's estate and a charitable deduction to Hugh's. Perhaps the double deduction is the only permissible result in *Estate of Edna Allen Miller*.[38] The Commissioner's argument to the contrary based, *inter alia*, on the purpose for the enactment of the section as set forth in its legislative history, namely to provide a "deduction for estate-tax purposes" where "no deduction is presently allowable" [39] is

30. Miller v. Commissioner, — F.2d — (3d Cir. 1968) *reported in* 2 CCH FED. EST & GIFT TAX REP. (68-2 U.S. Tax Cas.) ¶ 12,551 at 8786.

31. INT. REV. CODE OF 1954, § 2041.

32. Estate of Hugh Gordon Miller, 48 T.C. 265 (1967).

33. *Id.* at 270.

34. *Id.*

35. Miller v. Commissioner, — F.2d — (3d Cir. 1968) *reported in* 2 CCH FED. EST. & GIFT TAX REP. (68-2 U.S. Tax Cas.) ¶ 12,551 at 8788.

36. *Id.*

37. *Id.*

38. 48 T.C. 251 (1967).

39. S. REP. No. 2798, 84th Cong., 2d Sess., U.S. CODE CONG. & ADMIN. NEWS 4456 (1956).

difficult to support. As the Tax Court pointed out, this would be reading section 2055(b)(2) as if it contained conditions which were not inserted therein by Congress.[40] Moreover, there is no indication that Congress so intended the section to be interpreted.[41] On this point it would seem that both the Tax Court and the Third Circuit are correct and any change should come from Congress and not from a court.

The decision as to Hugh's estate, however, is not as easily defended. To allow a charitable deduction to both Edna's and Hugh's estates for the identical charitable gift of the same item is to place too much of a premium on literalness. The reasoning of the Tax Court, while open to the objections made by the Third Circuit, would seem to result in the better decision. Perhaps clarification will be forthcoming from the Supreme Court. In any event, Congress should act as soon as possible to resolve the complex problems of this area.

HOMER ELLIOTT

Federal Procedure—STANDING OF DISPLACEES TO CHALLENGE URBAN RENEWAL PROJECTS. Plaintiffs, the Norwalk Connecticut chapter of the Congress of Racial Equality, two tenants' associations representing displaced Negroes and Puerto Ricans, and four classes of individuals representing different types of displacees, brought a class action charging that defendants,[1] while implementing an urban renewal project, did not assure displacees equal protection of the laws and did not provide them adequate housing under section 105(c) of the Housing Act of 1949.[2] The court dismissed the action holding *inter alia* that neither the associations nor the individual plaintiffs had standing to challenge the official conduct of the defendants.[3]

40. Estate of Edna Allen Miller, 48 T.C. 251, 259 (1967).

41. *Id.*, citing from the legislative history of the section.

1. Defendants were The Norwalk Housing Authority, its executive director; The Norwalk Redevelopment Agency, its executive director and members; the City of Norwalk, its mayor and city clerk; Towne House Gardens and David Katz & Sons (responsible for the "middle income" housing development on the six acre site in question); the Asst. Regional Administrator of the Department of Housing and Urban Redevelopment (HUD) and Robert C. Weaver, Secretary of HUD.

2. Housing Acts of 1949 and 1954 (hereinafter called "the Act") 63 Stat. 413 (1949), *as amended*, 42 U.S.C. §§ 1441-1460 (Supp. 1967); and 68 Stat. 590 (1954), *as amended*, 42 U.S.C. §§ 1446-1460 (Supp. 1967).

3. Norwalk CORE v. Norwalk Redevelopment Agency, 42 F.R.D. 617 (D. Conn. 1967).