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Taxation -- Constitutionality of Clifford Regulations

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limitations. It may be used as a shield to prevent recovery, but not as a sword to accomplish recovery.

In liberally construing the Federal Torts Claim Act the court in the noted case has maintained that the United States, by bringing such an action, submitted itself "to the jurisdiction of the Court for the determination of all issues that might arise from the accident..." Since Congress has expressly provided for a two year limitation period, it appears that the court is going beyond the authority created by Congress under the veil of "liberal interpretation". However, the primary concern of limitation statutes is one of fairness to a defendant. He should not be called upon to defend a "stale" claim after the evidence has disappeared. In the instant case, the reason for the rule is not present. Therefore, the conclusion appears sound.

Alan R. Lorber.

**TAXATION — CONSTITUTIONALITY OF CLIFFORD REGULATIONS**

Petitioner contended that, by authority of one of the Clifford Regulations, the income of a charitable inter-vivos trust was taxable to the respondent-grantor who had retained a reversionary interest in the corpus, alleged by petitioner to take effect within ten years from the date of transfer of the corpus. Held, the trust was of ten years duration. However, a regulation which creates a conclusive presumption that the income is the settlor’s, based solely on the trust duration without regard to who actually derives the economic benefits, is void as it is arbitrary, unreasonable and violative of the Fifth Amendment. Commissioner of Internal Revenue v. Clark, 21 U.S.L. Week 2421 (7th Cir. March 3, 1933).

Under the Treasury Department’s Clifford Regulations, when the grantor of a living trust retains a reversionary interest, to take effect within ten years of the date of transfer, the income received by the beneficiary is taxable to the grantor, even though by the terms of the instrument he divests himself of all control over the income, and even though it be used for general charitable trust purposes. The theory is that by virtue of the short duration of the trust term, the grantor does not part with all of the

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2. In the instant case there were no controls retained by the grantor and the transfer was irrevocable for the stated term.
economic benefits of the property, but rather, employs a convenient method of income tax avoidance.

The fact that the brevity of the term is related to the retention of controls by the grantor has been recognized for some time by the courts. However, in the leading case on the subject, Helvering v. Clifford, it was held that no single element is normally decisive, but rather the length of the trust term should be considered in conjunction with other factors such as the administrative controls retained and the power to determine beneficial enjoyment. The Clifford Regulations are the Treasury's announced attempt to establish a set of precise rules taken from the broad principles of the Clifford case. But in practical application, they are more than a mere codification of the Clifford criteria because the regulation treats each of the factors as an independent ground for taxability; whereas under the interim case law, short term trusts were largely held not taxable to the grantor if no other strings were attached.

The peculiar aspect of the holding in the instant case stems from the
portion of the same regulation which prescribes the method of computing the length of the trust term. Any postponement is considered a new transfer in trust, beginning with the postponement date and ending with the new termination date. In the instant case, the taxpayer originally created a five year trust in 1941 with reversion date in 1946. Then in 1942, the termination date was postponed until 1951. Thus, although the aggregate length was ten years, the length for tax purposes was computed at nine years by the Commissioner. The Tax Court accepted the nine year computation but held for the taxpayer on other grounds.

Therefore, what appears at first to be mere dictum in the principal case amounts, in the writer’s opinion, to a square holding that the regulation is unconstitutional—on the reasoning that the court could not call the instrument a ten year trust, in derogation of the regulation, without in effect declaring it to be invalid. The court has ample authority behind its conviction that a conclusive presumption of beneficial ownership, under circumstances similar to these, is unconstitutional and that due process requires that the taxpayer have an opportunity to meet the burden of proof. This seems especially true where variable, rather than fixed, factors enter into the determination of who is the substantial owner of income for tax purposes. If a regulatory line can reasonably be drawn between substantial and non-substantial ownership determined solely by a term of years, then apparently it remains for the Treasury or Congress to convince the courts of that fact by acceptable regulation or statute.

Martin E. Kestenbaum

not parted with the beneficial ownership of the trust principal.”; Helvering v. Bok, 132 F.2d 365 (3rd Cir. 1942) (six year charitable trust held not taxable to grantor because no powers of control were reserved); Cory v. Commissioner, 126 F.2d 689 (3rd Cir. 1941), cert. den. 317 U.S. 642 (1942) (court refused to be “hampered by the calendar” even in a short term trust); Commissioner v. Chamberlain, 121 F.2d 765 (2d Cir. 1941) (four year trust not taxable to settlor because of absence of family purpose). But cf., Commissioner v. Buck, 120 F.2d 775 (2d Cir. 1941) (shortness of term held sufficient ground for taxing grantor since he was soon to reacquire complete dominion).

13. The Commissioner sought to assess the grantor for income of 1946, the year the regulation took effect.
15. The question before the court was whether the settlor should be taxed on the charitable trust income “solely because the duration of the trust is nine instead of 10 years.” Clark v. Commissioner, 17 T.C. 1357, 1361 (1952).
16. “We do not think Helvering v. Clifford, supra, or section 29.22(a)—21 of Regulations 111 were intended to or do apply to the income of a trust such as we have here.” Clark v. Commissioner, 17 T.C. 1357, 1363 (1952).
18. Heiner v. Donnan, 285 U.S. 312 (1932) (congressional act which created a conclusive presumption that gifts made within two years of death were made in contemplation of death, held violative of Fifth Amendment); Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (conclusive presumption that gifts made within six years of death were made in contemplation of death for state inheritance tax purposes held violative of Fourteenth Amendment).