The Gift Tax and Divorce Settlements

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because of the inhibitions of Sec. 708.07, Florida Statutes, 1941.11 The Court held that this section had not been modified or superseded by certain other sections of the Florida Statutes,12 and then laid down the doctrine that contracts to convey must "be executed and acknowledged in the form prescribed for conveyances of real property," in order to be specifically enforced.13

The decision apparently completely ignores the provisions of the 1943 act with reference to married women's acknowledgments, though that act by its terms makes such acknowledgments no "part of the execution of such instrument" and by its terms includes "contracts for the sale of lands" in its provisions.14 The 1943 act specifically repealed all laws in conflict with it,15 and it would seem that this provision should serve to repeal the acknowledgment requirement of Sec. 708.07 since that section was made a part of the law in 1892.16

The Supreme Court has not chosen to take this position, and as a result Berlin v. Jacobs destroys much of the usefulness of the 1943 acknowledgment act. While the opinion does not hold the contract void, it denies the holder the right to enforce the same by court proceedings, and thereby reaches the same result.

As a consequence, a shadow is thrown over the entire provisions of the 1943 act, and the coming legislature would do well to make such amendments as are necessary to Sec. 708.07 and other sections of the statutes to make them conform without possible question to the progressive spirit of the 1943 act.

THE GIFT TAX AND DIVORCE SETTLEMENTS

Few men when making a transfer of property under a divorce settlement feel that they are making a "gift". More often than not they feel that they are meeting the hard terms of a closely-bargained contract. The Commissioner of Internal Revenue is not interested, however, in the transferor's subjective feelings in such a matter. He

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11 Sec. 708.07, Fla. Stat. 1941: "Coverture shall not prevent a decree against husband and wife to specifically perform their written agreement to sell or convey the separate property of the wife, or to relinquish her right of dower in the property of the husband, but no agreement for the sale or conveyance of her real property or for relinquishment of dower, shall be specifically enforced unless it be executed and acknowledged in the form prescribed for conveyances of her real property and for relinquishment of dower."

12 Sec. 708.08, 708.09, 708.10, Fla. Stat. 1941 as amended by Laws 1943 c. 21932 and 21696.


15 Laws 1943, c. 21746, sec. 3.

is interested in the substance of the transaction, and in a recent ruling has indicated a renewed determination to subject such transfers to the federal gift tax. At the same time he has brought into greater harmony the application to divorce settlements of the gift tax and the estate tax.'

The controversy over the taxing of divorce settlements heretofore has centered chiefly around whether or not a divorce settlement is a transfer for "money or money's worth", and whether it is "a transaction which is bona fide, at arm's length". The Tax Court has consistently maintained that it is; the Commissioner has consistently maintained that it is not. The Treasury now recedes from this position in the new ruling. The Commissioner had argued previously that divorce settlements were in consideration of the "relinquishment of . . . marital rights" in the husband's "property or estate", that such a relinquishment was not a consideration "in money or money's worth" for estate tax purposes by specific statutory provision, and that by analogy it should not be so considered for gift tax purposes.

1 E. T. 19, Int. Rev. Bull., 46-16-12367. The key sentence of the ruling is: "With respect to transfers made pursuant to legal separation agreements or divorce decrees, it is the position of the Bureau that, for both estate and gift tax purposes, a release of support rights may constitute a consideration in money or money's worth."

1 See Rudick, Marriage, Divorce and Taxes, (1947) 2 Tax Law Review 123, 158.

Section 1002 of the Internal Revenue Code provides: "Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall . . . be deemed a gift . . ." Regulation 108, Section 86.8, provides: " . . . a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth . . ."

1 Herbert Jones, 1 TC 1207 (1943); Edmund C. Converse, 4 (CCH) TC, Dec. 14, 813 (1945); Mathew Lahti, 4 (CCH) TC, Dec. 14, 914 (1946); Clarence B. Mitchell, Dec. 4 (CCH) TC, Dec. 14, 854 (1946); Julien H. Hill, 5 (CCH) TC, Dec. 14, 974 (1946); Lewis Case Ledyard, 5 (CCH) TC, Dec. 15, 087 (1946).


Section 812B of the Internal Revenue Code provides: "A relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth'." This Section of the Code concerning estate taxes has now been read in toto into Section 1002 concerning gift taxes quoted above. Merrill v. Fabs (1945) 324 U. S.
Despite the Tax Court’s position on gift taxes, decisions prior to the new ruling had held that the estate tax did apply to divorce settlements which were not formalized or confirmed by a court decree. It did not apply, however, to divorce settlements ordered by a court or to private settlements embodied in a court decree. The effort of the Commissioner thus had been two-fold: (1) To apply the estate tax rule to all divorce settlements whether or not embodied in a court decree, and (2) whether arising under the gift tax or the estate tax. Since this position was never established, the law concerning taxation of divorce settlements prior to the new ruling was in the following confused state:

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<th>Gift Tax</th>
<th>Estate Tax</th>
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<tbody>
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<td>1. In a Court Decree</td>
<td>Not taxable</td>
<td>Not taxable</td>
</tr>
<tr>
<td>2. Not in a Court Decree</td>
<td>Not taxable</td>
<td>Taxable</td>
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On its face, the effect of the new ruling is that the Treasury recedes from position 2 above insofar as estate taxes are concerned, so that all divorce settlements are now taxed alike. The Treasury is here receding, however, from a hard won position, fortified by several CCA decisions. It can be assumed that it is withdrawing only to attack with renewed effort on a different front. The new method of attack on divorce settlements is clearly indicated in the following section of the new Treasury Ruling:

"... To the extent that a transfer does not exceed the reasonable value of the support rights of the wife it is to be treated as made for an adequate and full consideration in money or money's worth. The question whether the transfer is in excess of reasonable support rights is for the determination of the Bureau. That portion of any transfer which is allocable to the release by the wife of her property or inheritance rights is to be considered as not made 'to any extent' for an adequate and full consideration in money or money's worth."

"The establishment of a reasonable allocation is regarded as a proper matter for administrative determination by the Bureau in... 308: Commissioner v. Wemyss (1945) 324 U. S. 303. The effect of these two cases is to make all settlements before or at marriage clearly taxable as gifts.


1 F. B. Grinnell, 44 BTA 1286 (1941), aff’d sub nom. Commissioner v. State Street Trust Co., 128 F. (2d) 618, (CCA 1st 1942); Fleming v. Yoke, 53 F. Supp. 552 (D.C.N.D. W. Va., 1944), aff’d. 1945 F. (2d) 472 (CCA 4th, 1944); Edythe C. Young, 39 BTA 230 (1939); Estate of Silas B. Mason, 43 BTA 813 (1941); Estate of A. O. Smith, 4 (CCH) CT Dec. 14, 567 (M) (1945); Estate of P. M. Maresi, 5 (CCH) CT Dec. 15, 051 (M) (1946).
the absence of a reasonable allocation or segregation by the parties. In making this determination the facts and circumstances of each case will be separately considered. Elements to be considered are the amount of the husband's annual income, the extent of his assets, also the life expectancies of the parties and the probability of the wife's remarriage, alimony almost universally being limited to such periods. An agreement of the parties may provide for payments extending beyond the period of their joint lives. The required allocation in such a case will involve a determination of the question whether the aggregate amounts paid and payable exceed normal support rights, which ordinarily would terminate upon the death of the husband. The contingency of the wife's remarriage may be measured by actuarial standards.” (Italics added.)

The earlier tax assaults on divorce settlements had attempted to tax the entire transfer. No attempt seems to have been made to divide a settlement into (a) settlement for relinquishment of dower, widow's share, and other "marital rights" in the husband's property, and (b) settlement for right to support and maintenance. The Treasury has now decided to split divorce settlements through an "administrative determination by the Bureau in the absence of a reasonable allocation or segregation by the parties", and to levy a tax on a portion of such settlements. Earlier cases are thus to be disregarded only "to the extent that they hold that the right of a divorced wife to support from a former husband during the joint lives of the parties is a marital right in his property or estate". Any portion of a divorce settlement which is attributable to a settlement for relinquishment of dower or other similar rights will be continued to be considered a taxable transfer not made for "money or money's worth". Henceforth, therefore, a taxpayer who has made a divorce settlement must prove to the government the value of his divorced wife's right to support and maintenance. If this is not done to the government's satisfaction, the Bureau will make the determination of the value of this right and may thereby levy a gift tax on the donor of a divorce settlement for a large portion of the transfer.

* See footnote 7.