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**DEDUCTIBILITY OF VALUE OF DOWER INTEREST  
FROM VALUE OF TENANCY BY THE ENTIRETIES  
IN COMPUTATION OF GIFT TAX**

*Hopkins v. Magruder, Collector*<sup>1</sup>

In December, 1934, the plaintiff conveyed to himself and his wife as tenants by the entirety, subject to a life estate in his mother, fee-simple property located in Maryland. Prior to this conveyance the plaintiff alone held the fee-simple title, subject to the life estate. Under Section 501 of the Revenue Act of 1932, as amended,<sup>2</sup> the Commissioner of Internal Revenue determined that there was a taxable gift and assessed a tax with respect thereto. The plaintiff-taxpayer paid the tax and then brought suit against the Collector claiming that he was entitled to a refund because the value of the transfer as a gift had not been properly computed.

The Treasury Regulations, pertinent to the questions involved, provide that: "If a husband with his own funds purchases property and has the title thereto conveyed to himself and his wife as tenants by the entirety, and under the law of the jurisdiction governing the rights of the tenants, there is no right of severance by which either of the tenants acting alone, can defeat the right of the survivor to the whole of the property, there is a gift to the wife in an amount to be determined by adding to the value of her right, if any, under the law of such jurisdiction to a share of the income or other enjoyment of the property during the joint lives of herself and her husband, the value of her right to the whole of the property should she survive him, the value of each such rights to be determined in accordance with the Actuaries' or Combined Experience Table of Mortality, as extended."<sup>3</sup>

The basis of plaintiff's claim was that the wife had acquired by marriage a dower interest in the property and that this interest should be allowed as a deduction in computing the value of the gift on which the tax was assessed.<sup>4</sup> The lower Court held that the tax was properly

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<sup>1</sup> 34 F. Supp. 381 (D. C. Md., 1940); 122 F. (2d) 693 (C. C. A. 4th, 1941).

<sup>2</sup> 47 Stat. 245, 26 U. S. C. 550.

<sup>3</sup> Treasury Regulations 79, Art. 2 (7); see also Art. 19(8).

<sup>4</sup> For purposes of deduction, plaintiff contended that the value of his wife's dower right could be calculated in accordance with Rule 21 of the Rules of the Circuit Courts of Baltimore City, Md. Code (1939) Art. 16, Sec. 48.

assessed and that the wife's dower interest was not allowable as a deduction in computing the value of the gift. On appeal, the judgment was affirmed.<sup>5</sup>

The two decisions were based on entirely different grounds and as the opinion of the District Court dealt more extensively with tax law it will be treated in greater detail.

The Government's position was based on three contentions. First, that no deduction should be allowed since dower does not attach to a reversionary interest. The Court pointed out that under the Maryland law the contrary is true, citing *Chew v. Chew*<sup>6</sup> and *Shriver v. Shriver*.<sup>7</sup> Second, that the transfer here involved gave to plaintiff and his wife each an undivided whole of the property in reversion, whereas prior to the transfer the *plaintiff* had only an expectancy. In stating the Government's second contention, substantially as above, the Court obviously meant to say that prior to the conveyance the *plaintiff's wife* had only an expectancy. This contention seems to support the imposition of a gift tax on the transfer since it states that the donee-wife got a greater interest by virtue of the transfer. Yet implicit in the contention is the proposition that what the wife was given was her estate as tenant by the entireties less what she already had, an expectancy, i. e., her dower right. The contention does not support the Government's position that the value of the expectancy should not be allowed as a deduction. On this point, the Court said, ". . . the fact that the wife's dower interest had previously been created, namely, by her marriage to the plaintiff, and therefore had previously attached to the property, does not justify making a deduction for its value."<sup>8</sup> *Quaere*: Assuming dower has a value, why is a deduction not justified? The Government's third contention was that dower is an inchoate right, not capable of separate conveyance and may not therefore be given a value for purposes of deduction under the tax statute here involved. Until the death of the husband, a wife's dower right is inchoate and it cannot be deeded away by separate conveyance. Yet because the right of dower possesses these characteristics, does it necessarily follow that it can be assigned no value for purposes of deduction from the basis of a tax assessment? If dower can be valued for

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<sup>5</sup> 122 F. (2d) 693 (C. C. A. 4th, 1941).

<sup>6</sup> 1 Md. 163 (1851).

<sup>7</sup> 127 Md. 486, 96 A. 615 (1915).

<sup>8</sup> *Supra*, n. 1, 34 F. Supp. 384.

other purposes, why should it not be valued in this case?<sup>9</sup> According to the Court, the tax computation was made ". . . upon the present worth of the wife's right to one-half of the use of the whole property (plus the present worth of the right to receive the whole property should she survive her husband also) . . ." <sup>10</sup> This computation accords with the Treasury Regulations on the subject. The Court then went on to say that the gift was computed to embrace only rights which the wife actually possessed, ". . . rights that had present worth; whereas an inchoate dower interest has no present worth." <sup>11</sup> The present worth of a right of survivorship in a tenancy by the entireties would seem to be as difficult to determine as the present worth of an inchoate dower interest (conceding that for the same piece of property the extent of value of the latter interest would be much smaller). Taxation has often been stated to be a practical matter. As a practical matter, if the wife predeceases her spouse, the value of her potential right to take the whole property will be the same as the value of her dower right. The Supreme Court has said: "The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions." <sup>12</sup> The same statement might be appropriately made with respect to the operation and administration of a tax law.

The judgment against the plaintiff-taxpayer was affirmed on appeal but the decision rested not on principles of taxation but on the ground that dower does not attach to a reversionary interest. The Circuit Court of Appeals did not agree with the District Court's interpretation of the *Chew* and *Shriver* cases.<sup>13</sup> However, it is not the province of this casenote to discuss this point.

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<sup>9</sup> A casenote in (1941) 54 Harv. L. Rev. 519, noting the principal case, takes the same position. There the writer argues that, in computing the taxable value of the gift, "the practical difference in market value attributable to W's antecedent dower interest" should be recognized. "This difference can be ascertained with reasonable accuracy by the use of mortality tables."

<sup>10</sup> *Supra*, n. 1, 34 F. Supp. 384. *Cf.* *Banking and Trust Co. v. Neilson*, 164 Md. 8, 164 A. 157 (1932) as to whether a wife has any separable share in the lifetime enjoyment of a tenancy by the entireties.

<sup>11</sup> *Supra*, n. 1, 34 F. Supp. 384. See *Reiff v. Horst*, 55 Md. 42 (1880).

<sup>12</sup> *U. S. v. Jacobs*, 306 U. S. 363 (1939).

<sup>13</sup> *Supra*, n. 5, 122 F. (2d) 693. The Circuit Court, after quoting *Kent* and *Minor*, said: "The authorities relied upon by the taxpayer . . . do not convince us that the rule of law as stated by *Minor* and *Kent* is wrong . . . under the common law as applied in Maryland the wife of the taxpayer had no dower right in the real estate conveyed."

In considering and commenting on judicial decisions concerning taxation, there is a tendency to criticize the courts for apparently ignoring inconsistencies and inequities which are present in the varying applications of the taxing statutes. Cases on taxation usually reach the courts on the objection that a particular application of a tax law violates the Constitution. Because a tax law is harsh or because its operation is logically irreconcilable with other legal principles does not mean that the law is unconstitutional. As stated in *U. S. v. Jacobs*: "The wisdom of both the tax and of its measurement was for Congress to determine."<sup>14</sup> The student of taxation should always keep this customary judicial approach in mind.

In the instant case the Treasury Regulations represent a detail which Congress has allowed the Bureau of Internal Revenue to determine. Section 501 of the Revenue Act of 1932 provides merely that "If a gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift." So it seems that the question here is not one of constitutionality but rather a question of the validity of the Regulation in light of the above section. The force and effect to be given to such regulations where the statute is silent has been the subject of much discussion. This is particularly true where a regulation construing an act has continued in effect during a reenactment of the statute construed.<sup>15</sup> The better view seems to be that although interpretative regulations are entitled to great weight they should not be regarded as conclusive. Whether or not a particular regulation should be given effect is essentially a problem of administration rather than of law "and the key to the problems that arise should be sought through the approach of sound tax administration."<sup>16</sup> Viewed in this light, are the regulations, involved in the instant case, sound? It is submitted that the regulations are valid as far as they go. It should be noted that they are silent on the question of a possible deduction for a previously acquired dower right. The following argument has been advanced to support the decision forbidding this deduction. If the plaintiff's contention had been sustained the valuation of *any* gift from one Maryland spouse to the other would have to be reduced by

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<sup>14</sup> *Supra*, n. 12.

<sup>15</sup> Griswold, *A Summary of the Regulations Problem* (1941) 54 Harv. L. Rev. 398. See also Brown, *Regulations, Reenactment, And the Revenue Acts* (1941) 54 Harv. L. Rev. 377.

<sup>16</sup> Griswold, *supra*, n. 15, 423.

the value of the expectancy which the donee spouse has under the Maryland law. It is submitted that this would be a proper method of assessing a gift tax. A tax on gifts is a tax on gratuitous transfers of property from one person to another. Where the donee already has an interest in the property transferred, it seems only right that the value of this interest be deducted from the total value of the subject of the gift.

In the principal case, the District Court relied on the decision in *Thompson, Petitioner, v. Commissioner of Internal Revenue*.<sup>17</sup> In that case it was held that where a wife gave property to her children, the husband's release of his curtesy interest did not constitute a separate gift and the whole value of the property was taxable to the wife. To prevent the attempted evasion the Board of Tax Appeals held that the release of an inchoate curtesy interest did not constitute a gift. The question was who was going to pay the tax on the transfer of property and not, as in the principal case, what was the value of the property *passing* to the donee? The argument relied on in the *Thompson* case and considered applicable to the situation presented to the Court in the *Hopkins* case, was that if a deduction was allowed for dower or curtesy interests then it would follow that if one spouse purchased land the dower or curtesy interest thereby acquired by the other spouse would constitute a taxable gift. This is not necessarily true since in such a case there would not be any intent to make a gift and it would seem extremely doubtful whether there would be a transfer.

Apart from the problem of retroactivity, the most troublesome question in tax cases involving dower interests and tenancies by the entireties is the problem of how to properly calculate the value of the gift on transfer. In the principal case the plaintiff, on the authority of *Lilly v. Smith*,<sup>18</sup> conceded that a transfer to himself and his wife as tenants by the entireties constituted a taxable gift under the statute. In that case the husband supplied the consideration and the transfer was from a third party to the husband and wife, consequently the question concerning a deduction for a previously acquired dower right was not raised. The value of the taxable gift was computed

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<sup>17</sup> 37 B. T. A. 793 (1938).

<sup>18</sup> 96 F. (2d) 341 (C. C. A. 7th, 1938); cert. den. 305 U. S. 604 (1938); motion for rehearing denied 307 U. S. 651 (1938). To the same effect is *Commissioner v. Hart*, 106 F. (2d) 269 (C. C. A. 3d, 1939).

in the manner prescribed by the Regulations.<sup>19</sup> If no question concerning dower is involved, this method seems just and proper.

Under Federal Estate Tax statutes it has been held in the case of *Tyler v. U. S.*,<sup>20</sup> that where an entireties estate in stock is created after the passage of the tax act the whole value of the property should be included in the gross estate. The taxpayer contended that by the inclusion of the whole value the tax amounted to a direct tax on one-half of the property and was invalid, therefore, because not apportioned. The Court there said that the tax was a death duty and that, disregarding property fictions, death caused an actual shifting of economic benefits to the surviving spouse which Congress could constitutionally tax. The Supreme Court later held that the same method of valuation was applicable to an entireties estate created *prior* to passage of the taxing statute.<sup>21</sup> Of course, the part of the value of any joint estate contributed by the survivor is not included in the decedent's gross estate.<sup>22</sup> In the *Lilly* case, the Court felt that the estate tax valuation assessed in the *Tyler* case (where the whole property was included) was inconsistent with the assessment of a gift tax on only one-half the value of the estate. The Court justified any inconsistency with the statement that ". . . the Government's right to tax is not dependent upon the well-recognized origin and characteristics of an estate by the entirety."<sup>23</sup> It is only natural that, although estate taxes and gift taxes are both excises, the differences in the events which are made the occasion for a tax will result in different applications of the taxing statutes.

In conclusion, it is submitted that the decision in the instant case is not logical, and that a contrary result would not unduly increase the administrative burden of the tax collector. The interpretation supported by the courts herein may be constitutional and yet not be a wise interpretation of the intent of the gift tax statute.

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<sup>19</sup> *Supra*, n. 3.

<sup>20</sup> 281 U. S. 497 (1930).

<sup>21</sup> *Third National Bank v. White*, 45 F. (2d) 911; affirmed 287 U. S. 577; *Helvering v. Bowers*, 303 U. S. 618 (1937). Joint tenancies are treated the same as tenancies by the entireties.

<sup>22</sup> Section 302 (e) as amended by Sec. 404 of the Revenue Act of 1934; Regulations 80, Arts. 22, 23.

<sup>23</sup> *Supra*, n. 18.