Volume 71
Issue 3 *Issues 3 & 4*

Article 26

June 1969

Gift Taxes--Valuation of Right to Income Under §2503 (b)

Joseph R. Goodwin
West Virginia University College of Law

Erwin Conrad
West Virginia University College of Law

authority could not discriminate arbitrarily against existing tenants in their right to continue occupancy. Finally, in *Edwards,* (employing the constitutional arguments of Judge Wright's opinion, without having to resort to his discussion of statutory construction) the prevention of public retaliatory evictions may be extended to the private sector under the *Shelley* doctrine. Therefore, the action instituted by the landlord to evict the tenant must not hinder her constitutionally protected right to petition the government for grievances.[25]

Possibly, this decision will seriously hamper the rights of the landlord in private action. How far it will extend is difficult to predict. However, under present holdings, the right of the individual to seek redress for his grievances is a fundamental first amendment right which outweighs the right of a retaliating landlord to evict tenants. This decision concerns only one of the many options open to a property owner. Property may be leased, sold, rented, built upon, or used for any legal purpose. The holding of this case concerns only rental property; therefore, in reality, the change may not be as drastic as it may first seem. Notwithstanding the protection afforded by this case, the landlord may resort to other effective means of retaliation—the raising of rent or subsequent evictions of the tenant for trivial violations of skillfully written leases. Nonetheless, the holding in the *Edwards'* case, at least to some degree, allows the tenant to strive for better housing conditions without the fear of eviction for his actions.

Hugh C. Avis
John Watson Cooper

Gift Taxes—Valuation of Right to Income Under §2503(b)

In 1961, Leonard Rosen and his brother Julius created separate trusts for their children consisting of several thousand shares of Gulf American common stock. The entire net income of each trust was payable to the named beneficiary no less frequently than annually. The corpus of the Leonard Rosen trust was to be distributed to each beneficiary in two payments upon the beneficiaries reaching the ages of twenty-five and thirty years. The corpus of the Julius Rosen trust was to be distributed in three installments to

---

[25] Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968).

the beneficiaries upon attaining the age of 25, 30, and 35. Provisions were made in each trust for gifts over in the event of the death of any of the beneficiaries prior to distribution. The trust instruments also provided that the trustees of each trust should have the power to sell the Gulf American shares and re-invest the proceeds in non-income or income producing property. They did not, however, have the power to invade the corpus for any purpose.

In the years 1962 and 1963, the Rosens made further gifts of Gulf American shares to the trusts established by them in 1961. Taxpayers then claimed gift tax exclusions for 1961, 1962, and 1963 for the "income interests" of the shares of Gulf American basing their claims on section 2503(b) of the Internal Revenue Code.

Since Gulf American had retained all its earning for growth purposes and since no dividends had ever been paid on the shares constituting the trust, the taxpayers valued the income interests by applying the actuarial factors in table I, column 3 of section 25.2512(f) of the gift tax regulations. The parties agreed that the gift of the corpus in each trust was a gift of a future interest but, the government, while stipulating that the income interests donated were present interests, nevertheless insisted that the exclusion was not available since the interest had no ascertainable value. The Tax Court held the government's contention and the taxpayers appealed *Held,* reversed. Since the government conceded that a valuable right was donated, it is inconsistent to contend that the right is valueless for tax purposes. While the value of the income interests donated here is not one which is easily ascertainable, the use of actuarial tables to determine the value of such an interest is not unrealistic or unreasonable. *Rosen v. Commissioner,* 397 F.2d 245 (4th Cir. 1968).

Section 2503(b) of the Internal Revenue Code of 1954 provides for a gift tax exclusion of the first $3,000 of the value of gifts of property other than future interests.[1] In order for the donor to be eligible for the exclusion, however, the gift must be completed. That is to say, the donor must relinquish all dominion and control

[1] "In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1955 and subsequent calendar years, the first $3,000 of such gifts to such person shall not, for purpose of subsection (a), be included in the total amount of gifts made. . . . INT. REV. CODE of 1954 § 2503(b).

and there must be a transfer with donative intent.[2] Moreover, the interest donated must be a present interest in order to qualify for the exclusion.[3]

In the *Rosen* case, there was a completed gift in trust of both future and present interests.[4] The Rosens claimed exclusions for the income interests donated and the government conceded and stipulated that the income interest in each trust was a present interest.[5] Nevertheless, the Tax Court took the view that since there had never been income in the past, there would never be any in the future and therefore that the donated income interests "were as illusory as a million-dollar bequest in a pauper's will."[6] It was this line of reasoning which was repudiated by the court of appeals.[7]

The court of appeals pointed out that it is inconsistent to concede that a valuable right has been donated and then contend that the gift is valueless for tax purposes.[8] Recognition of this inconsistency in the trial court's reasoning is much more important than it appears at first glance. Implicit in the court of appeals' discussion on this point is the severability of the tests of valuation and whether or not a future interest has been donated.[9] The specific question presented in *Rosen,* then, was not whether the income interests donated by the Rosens were present interests since the government had so

---

[2] Talge v. United States, 229 F. Supp. 836 (W.D. Mo. 1964).

[3] A present interest is an interest generally vesting in possession or enjoyment at the completion of the gift. A future interest is limited to commence in enjoyment or possession in the future. *See* Commissioner v. Disston, 325 U.S. 442 (1945).

[4] Rosen v. Commissioner, 397 F.2d 245, 246 (4th Cir. 1968).

[5] *Id.* at 247. It had previously been held that where the trust income is required to be paid at least annually and where the distribution of the corpus of the trust is deferred, the gift of the corpus is a future interest and the gift of the present income is a present interest. Fondren v. Commissioner, 324 U.S. 18, 21 (1945).

[6] *See.* Rosen v. Commissioner, 48 T.C. 834, 847 (1967).

[7] Rosen v. Commissioner, 397 F.2d 245, 247 (4th Cir. 1968).

[8] "It is important to note that it has not been suggested to us that the 'income interest' was valueless. Rather the government concedes that a *present* income interest (rather than a future interest, C. I. R. v. Disston, *supra*) was in fact donated. The concession seems to us near fatal. The government entertains two inconsistent positions—on one hand conceding that a valuable right was donated and on the other contending that for tax purposes the right is valueless." *Id.*

[9] Certainly the problem of whether or not an interest is present or future and the problem of valuation of an interest are both generally present in the litigated cases. However, in this case, the problem of valuation stood alone since the government had stipulated that a present interest had been donated. Rosen v. Commissioner, 397 F.2d 245, 247 (4th Cir. 1968).

stipulated,[10] but whether such interests were capable of, or could be properly valued by reference to actuarial tables.[11]

Just because a present interest has been donated, it does not necessarily follow that the gift tax exclusion specified in section 2503(b) will be available. More particularly, the present interest must be capable of valuation.[12] That is to say, $3,000 cannot be excluded from the *value* of a gift unless that gift is somehow susceptible of valuation.[13]

Generally speaking, the value of the subject matter of a gift at the date of transfer is considered the amount of the gift.[14] Moreover, in the usual case, the value of a gift is determined by its market value.[15] The market value of property is generally the dollar figure

---

[10] It is at least arguable that the government made a mistake in conceding that a present interest was donated. It has been made clear that the gift tax definition of a future interest need not be the same as the definition of that term under local property law. United States v. Pelzer, 312 U.S. 399 402-03 (1941). Moreover, the definition of a future interest in the regulations would seem to include gifts of interests such as those in the Rosen case. "'Future interest' is a legal term, and includes . . . interests or estates whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time." Treas. Reg. § 25.2503 (a) (1958). The interests in the *Rosen* case were certainly in all practicality limited to "commence in use and possession or enjoyment at some future date or time" since nothing to use, possess or enjoy was transferred at the time of the gift. On the other hand, the gifts in the *Rosen* case might also seem to fall within the definition of a present interest as defined in the regulations. "An unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain) is a present interest in property." Treas. Reg. § 25.2503-3(b) (1958). The children might be said to have received "[a]n unrestricted *right* to the immediate use, possession, or enjoyment of . . . the income from property . . . ." (Emphasis added). This paradox seems to arise from the peculiar facts in *Rosen* and the slight semantical disparities existing between paragraphs (a) and (b) of Treas. Reg. § 25.2503-3 (1958). Perhaps a judicial emphasis on the present enjoyment aspects of the definitions used in Treas. Reg. § 25.2503-3(a)(b) would avoid the confusion.

[11] The United States Government incorporated acturial tables into the gift tax regulations in 1936. Since that time, these tables have been updated and the actuarial tables presently set forth in Treas. Reg. § 25.2512-5 (f) (1958) have enjoyed widespread and long-standing use. The tables set forth in § 25.2512-5 (f) are to be used in valuation of the present value of a gift or an annuity, life estate, remainder, or reversion.

[12] Fischer v. Commissioner, 288 F.2d 574, 577 (3rd Cir. 1961).

[13] Riter v. Commissioner, 3 T.C. 301, 303 (1944). The difficulty of valuation is probably one of the reasons that the gift tax exclusion is restricted to present interests. 51 Marq. L. Rev. 332, 334 (1968).

[14] Morgan v. Commissioner, 353 F.2d 209 (4th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966).

[15] The value of most gifts is determined by ascertaining their market value at the date of the gift. Hipp v. United States, 215 F. Supp. 222 (W.D.S.C. 1962).

at which "such property would change hands between a willing buyer and a willing seller."[16] However, where as in the instant case, the subject matter of the gifts (the income interests in the trusts) is not such property as is sold on the market, some other method of valuation must be found. The method prescribed by the regulations seemed the logical alternative to the Rosens.[17]

Section 25.2512-5 of the gift tax regulations provides for the valuation of terms for years by reference to tables of actuarial factors.[18] Moreover, the use of such tables is said to be justified where there is an element of speculation in the valuation and where the use of such tables is actuarily sound.[19]

On the other hand, it is clear that the value of such an interest cannot be unreasonably uncertain.[20] The uncertainty of valuation of the income interest of a trust has often been held reason enough to deny the taxpayer the gift tax exclusion. However, the cases so holding are all readily distinguishable from the *Rosen* case.[21]

---

[16] Market value is defined in the Treasury Regulations as follows: "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts." Treas. Reg. § 25.2512-1. For application of this rule see O'Malley v. Ames 197 F.2d 256, 257 (8th Cir. 1952); Arc Realty Company v. Commissioner, 295 F.2d 98, 103 (8th Cir. 1961).

[17] *See* Hipp v. U. S., 215 F. Supp. 222, 228 (W.D.S.C. 1962).

[18] Note that the Rosens used the wrong table. Treas. Reg. § 25.2512-5(2)(1958) provides in pertinent part that "[t]he present value of an annuity, life estate, remainder or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by the use of Table I in paragraph (f) of this section. The present value of an annuity, term for years, remainder or reversion dependent on a term certain is computed by the use of Table II in paragraph (f)." The Rosens used Table I to value the income interest. They should have used Table II. The interests of the beneficiaries of the *Rosen* trusts were dependent upon a term certain not upon a life estate. However, the fact that the taxpayer used the wrong table was not considered by the court, and the basic issue decided was not which Table could be used but whether resort to *any* actuarial Table could be had.

[19] Hipp v. U. S., 215 F. Supp. 222, 228 (W.D.S.C. 1962), where the Court said: "[T]he Court is convinced that any valuation of the income interest would be little better than a guess. In such a case it is clear that the method prescribed by the regulation should be used."

[20] This is axiomatic. *See* Fischer v. Commissioner, 288 F.2d 574 (3rd Cir. 1961).

[21] For example, in Funkhouser v. Commissioner, 275 F.2d 245 (4th Cir. 1959), the trustees were given absolute discretion to invade the corpus of the trust to the extent they deemed necessary to provide for any emergency illness of the beneficiaries or their immediate families. Therefore, no beneficiary had an unqualified right to receive income for any ascertainable period of time. Because of the powers of invasion given the trustees, there was no certainty as to the duration or amount of the corpus.

The beneficiary's income interest was contingent on the trustee's

In all of the cases denying the exclusion there was no certainty as to either the duration of the income interest or the amount of the corpus. Specifically, either the length of time the beneficiary was to receive the income was indefinite or the amount of property in the corpus of the trust was subject to invasion. The income interests in the *Rosen* trusts were not so infirmed. The income interests in the *Rosen* trusts were somewhat speculative in nature. Certainly much of their value depended upon future contingencies, but this only made the problem of valuation difficult. The income beneficiaries under each of the *Rosen* trusts had an unqualified right to income for a definite period and no person had the power to destroy the right to receive such income by an invasion of the corpus. Therefore, while the values of the income interests in the *Rosen* trusts were somewhat uncertain, it was the certainty as to duration of interest and certainty as to amount of corpus which distinguished them from the cases cited for the government and made resort to the tables of Treasury Regulation § 25.2512(f) actuarily sound.

Joseph R. Goodwin
Erwin Conrad

INFANTS-NEGLIGENCE-STANDARD OF CARE

Defendant, an eleven-year-old boy, was playing golf with his mother and two other adults. The plaintiff, about 150 yards away and in plain view, was struck by a golf ball driven by the defendant. The defendant had been playing golf two to three times a week during the season for the past two years, and in view of this, the trial court charged the jury that the infant was to be held to the adult

---

discretion until mortgages and encumbrances against the trust property were discharged in full in the case of Commissioner v. Brandegee, 123 F.2d 58 (1st Cir. 1941).

In Fischer v. Commissioner, 288 F.2d 574 (3rd Cir. 1961), the settlor and trustees had the power to invade the principal to make loans, and the beneficiary's interest in this trust was subject to being cut off by any attempt at alienation on his part or by his becoming bankrupt.

In La Fortune v. Commissioner, 263 F.2d 186 (10th Cir. 1958), the trustee had the power in his discretion to terminate the trust at any time and in Vogel v. United States, 42 F. Supp. 103 (D. Mass 1941), the trustees had the power to alter or amend the trust instrument in whole or in part at any time and to change beneficiaries or adjust the beneficiary's share under the trust. *See also* Herrman v. Commissioner, 235 F.2d 440 (5th Cir. 1956); Riter v. Commissioner, 3 T.C. 301 (1944); Geller v. Commissioner, 9 T.C. 484 (1947).