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## Taxation--Estate Tax--Alimony Deduction

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## CASE COMMENTS

TAXATION—ESTATE TAX—ALIMONY DEDUCTION.—Under a separation agreement, *H* agreed to pay and *W* to accept a fixed sum annually, in full satisfaction of her rights in *H*'s property. The agreement was later incorporated into a Nevada divorce decree. Thereafter *H* died and his estate was administered in West Virginia. *Held*, that the present value of *W*'s claim was deductible in computing the federal estate tax on *H*'s estate. *Fleming v. Yoke*, 53 F. Supp. 552 (N. D. W. Va. 1944), *aff'd mem.*, 145 F. (2d) 472 (C. C. A. 4th, 1944).

This case involves a construction of section 303 of the Revenue Act of 1926 respecting deduction of claims against the estate. Amendments as to claims based upon a promise or agreement not acquired bona fide for consideration in "money or money's worth" expressly provide that relinquishments of dower or other marital rights in decedent's estate is not such consideration as will give rise to a deductible claim. INT. REV. CODE §812 (1939) provides: "For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate . . . (b) Expenses, losses, indebtedness, and taxes . . . such amounts . . . (3) for claims against the estate . . . (5) . . . as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered . . . The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth . . . For the purposes of this subchapter, 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'."

As to income taxation, in the analogous situation where the husband created a trust the income of which trust should be used for alimony payments, it was held, when such income was paid in discharge of the husband's obligation, attributable to the settlor husband, *Douglas v. Willcuts*, 296 U. S. 1, 56 S. Ct. 59, 80 L. ed. 3 (1935); but if he could show that, by the *lex fori*, the divorce decree together with the trust arrangement operated as a full and final discharge of his duty to support, the trust income would not be imputed to him. *Helvering v. Fuller*, 310 U. S. 69, 60 S. Ct. 784, 84 L. ed. 1082 (1940). The burden was on the husband to show by "clear and convincing proof" a complete discharge

without continuing obligation. *Helvering v. Fitch*, 309 U. S. 149, 60 S. Ct. 427, 84 L. ed. 665 (1940). In 1942, Congress changed the law so far as regards income tax by specially providing that all such trust income (except that portion used for the support of children) be included in the wife's and not in the husband's gross income. INT. REV. CODE §22k (1942) provides, "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of a separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree . . . shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband."

As to the estate tax, if the claim is based only upon an agreement *inter partes*, a wife's relinquishment of her right of support being the release of a marital right is not such consideration as creates a deductible claim, *Meyer's Estate v. Commissioner*, 110 F. (2d) 367 (C. C. A. 2d, 1940), cert. denied 310 U. S. 651, 60 S. Ct. 1103, 84 L. ed. 1416 (1940), although so much of a settlement is based on the wife's promise to support a child during the time the child lived with her has been held deductible, not being a release of a marital right. *Helvering v. United States Trust Co.*, 111 F. (2d) 576 (C. C. A. 2d, 1940), cert. denied, 311 U. S. 678, 61 S. Ct. 45, 85 L. ed. 437 (1940). Since deductions are matters of legislative grace, the taxpayer has the burden of showing that the claim is based upon adequate consideration in "money or money's worth." *Markwell Estate v. Commissioner*, 112 F. (2d) 253 (C. C. A. 7th, 1940).

Inquiry into the consideration is relevant only where the basis of the claim urged as a deduction is a promise or agreement. Thus, a claim arising from an obligation imposed by law, *Mason v. Commissioner*, 43 B. T. A. 813 (1941), or one in tort, *Smith v. United States*, 16 F. Supp. 397 (D. Mass. 1936), aff'd sub. nom. *United States v. Nicholas*, 92 F. (2d) 704 (C. C. A. 1st, 1937), is deductible, but a claim for dower or other marital portion is not a deductible claim. *Estate of Nellie G. B. Dodge*, 40 B. T. A. 209 (1939). A claim asserted against the estate, if based upon a divorce decree, has been regarded as an obligation imposed by law, *Young v. Commissioner*, 39 B. T. A. 230 (1939), hence deductible, even though there is evidence of a prior agreement between the parties. *Commissioner v. State Street Trust Co.*, 128 F. (2d) 618 (C. C. A. 1st, 1942); but cf. *Helvering v. United States Trust Co.*, 111 F. (2d) 576 (C. C. A. 2d, 1940), cert. denied 311 U. S. 678, 61 S. Ct. 45, 85 L. ed. 437 (1940).

The limitations imposed upon deductibility of claims based upon a promise or agreement would seem to have been inserted primarily to prevent collusive arrangements to avoid tax liability. The probability of a taxpayer's resorting to such an extreme device as divorce to avoid payment of estate taxes is remote. In analyzing the purpose of the legislation the court said, at page 555, "Divorce decrees are not collusive but adversary in their nature. Such decrees do not subvert Congressional intent because the dower or curtesy interest of a spouse would not and could not survive the divorce, and, therefore, would never be included in gross estate under the statute in question." A man may have much different and ordinarily stronger reasons for wishing that his spouse no longer live with him as his wife than for wishing that she not live as his widow after him, and the same danger of over-generosity to induce the desired result accordingly does not exist in the two cases. The present decision conforms with the general purpose of the relevant legislation and achieves a desirable result. But cf. Comment (1942) 56 HARV. L. REV. 314.

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TAXATION—EXCISE ON GASOLINE—PRIOR PAYMENT AS CONDITION TO REFUND.—*T* was a distributor of gasoline both before and after July 1, 1939, the effective date of the statute substantially amending the prior gasoline tax system and which is the basis of the present system. W. Va. Acts 1939, c. 125. The former tax scheme had, as to distributors, given an option as to the time of accrual of liability, one alternative, which was elected by *T* being that liability should accrue at the time of sale. The amended tax scheme provided for accrual of liability at the time of production or receipt of the gasoline with respect to which the tax was imposed, W. VA. REV. CODE (Michie, 1937) c. 11, art. 14, §3, a provision which the court construed as imposing liability on account of gasoline theretofore acquired by distributors as of July 1, 1939, the effective date of the act, with respect to stocks theretofore acquired and actually held by distributors on that date. *T* had a considerable stock of gasoline on July 1, to which additions and from which withdrawals for sale were made in the next few months. On October 19, there was a loss by breakage in the storage tanks of 44,588 gallons. *T* paid taxes on account of all gasoline acquired by it between July 1 and October 19, and all gasoline held in stock on July 1, except for a sum substantially equivalent to the taxes attributable to the 44,588 gallons lost by breakage, as to which amount it asserted a claim of nonliability, relying on the statutory provision for refund to distributors on amounts paid for gasoline lost by speci-