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NO. 64613-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Matter of the:

ESTATE OF BARBARA J. NELSON,

WILLIAM C. NELSON, BRIAN S. NELSON and JANET MCCANN,
Personal Representatives of the Estate of Barbara J. Nelson,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

This case involves the Washington estate tax, chapter 83.100 RCW, and whether "qualified terminable interest property" ("QTIP") included in the taxable estate of a surviving spouse may be deducted in computing the Washington estate tax owed when that surviving spouse dies. QTIP is a life estate set up to take advantage of the marital deduction allowed under federal estate tax law. When a spouse dies, his or her estate can elect to create a QTIP trust that provides income to the surviving spouse for life. Upon the surviving spouse's death, the assets remaining in the QTIP trust are treated under the federal law as passing from the surviving spouse to the remainder beneficiaries of the QTIP trust. In this way, estate tax on the QTIP is deferred until the second spouse dies. *Eisenbach v. Schneider*, 140 Wn. App. 641, 652-53, 166 P.3d 858 (2007).

Barbara Nelson, who died in 2006 and whose estate is bringing this appeal, was a lifetime beneficiary of two QTIP trusts established on the death of her husband, William. William Nelson died in 2004, and his estate elected and accepted the benefit of a QTIP deduction in computing its federal and Washington estate tax. While the estate of William Nelson received the benefit of the QTIP deduction, federal estate tax law—specifically section 2044 of the Internal Revenue Code—required the estate of Barbara Nelson to include the value of that QTIP as part of its taxable estate. The estate of Barbara Nelson complied with this statutory requirement and included the QTIP, valued at over $8 million, as part of its taxable estate for federal estate tax purposes. However, for purposes of its Washington estate tax reporting and payment obligations, the estate argues that it is permitted to exclude the QTIP in computing the Washington tax. The estate is wrong. Under Washington law, QTIP included in the federal taxable estate is also included in the Washington taxable estate. *See* RCW 83.100.020(13) (defining "Washington taxable estate" as "federal taxable estate" less certain deductions not related to QTIP). There is simply no deduction or exemption that applies under the facts of this case.

The estate tries to avoid the Washington tax by arguing that there was no taxable "transfer" of the QTIP when Barbara Nelson died, and that including the QTIP in its Washington taxable estate results in an unconstitutional "retroactive" application of the Washington tax. Both of these augments are unfounded.

By express federal law, QTIP is treated as passing from the surviving spouse when the surviving spouse dies. IRC § 2044(c). This qualifies as a taxable "transfer" of the QTIP under federal and Washington law. Treating the passing of the QTIP when the second spouse dies as a "transfer" of that property is designed to achieve the tax deferral purpose of the QTIP provisions, and has been a part of the federal and Washington estate tax law since the QTIP provisions were first enacted in 1981. Moreover, taxing the value of QTIP that is treated as passing when Ms. Nelson died in 2006 does not make the tax "retroactive." The Estate simply misstates or misunderstands the relevant federal and state law in an effort to avoid paying the Washington tax.

The superior court correctly determined that the estate of Barbara Nelson was not entitled to deduct QTIP treated as passing when Ms. Nelson died. The Department respectfully requests that the decision of the superior court be upheld in this appeal.

II. RESTATEMENT OF THE ISSUES

This case raises three issues:

1. Whether the Washington estate tax code allows a deduction or exemption for QTIP included in the decedent's taxable estate under IRC § 2044?

2. Whether the Washington estate tax as amended in 2005 constitutes an unconstitutional, retroactive, tax on QTIP included in the decedent's taxable estate under IRC § 2044?

3. Whether administrative rules adopted by the Department in 2006 provide an "alternative" basis for a deducting QTIP included in the decedent's taxable estate under IRC § 2044?

III. STATEMENT OF THE CASE

A. Facts Relating To The Estate Of William Nelson.

While this case involves the estate tax treatment of QTIP included in the taxable estate of Barbara Nelson, facts pertaining to the QTIP election made by Barbara's husband, William Nelson, are important. William Nelson died on September 14, 2004. CP 11. In his will, William established two marital trusts naming Barbara Nelson as the lifetime beneficiary and granting her a limited testamentary power of appointment over the trust assets. *Id.*; CP 214-15 (article "Sixth" of will). The estate of

William Nelson filed a United States estate tax return, CP 238, and made an irrevocable QTIP election under section 2056(b)(7) of the Internal Revenue Code as to both marital trusts. CP 11. By electing QTIP treatment, the estate of William Nelson was allowed to deduct the value of the qualified terminable interest property in computing its federal and Washington estate tax liability.[1]

B. Facts Relating To The Estate Of Barbara Nelson.

Barbara Nelson died on October 15, 2006. CP 9. Ms. Nelson was a resident of King County when she died. *Id.* As noted above, Ms. Nelson was predeceased by her husband, William, who died in 2004. CP 11.

The estate of Barbara Nelson ("Estate" or "Barbara Nelson Estate") filed a United States estate tax return. CP 78-108. On that return the Estate reported a taxable estate of $13,945,734.89. CP 78, part 2, line 3c. Included in the taxable estate was QTIP in the amount of $8,039,555.25. This QTIP was included in the Estate's taxable estate as required by section 2044 of the Internal Revenue Code, and was "treated as property passing from the decedent." *See* IRC § 2044(c).[2]

The Estate filed its Washington estate tax return on January 9, 2007. CP 109. On the state return the Estate reported a "tentative taxable estate" of

[1] The actual amount of the QTIP deduction taken by the estate of William Nelson is not in the record on appeal because the estate of Barbara Nelson has redacted much of the tax information contained in the federal estate tax return filed by the estate of William Nelson. *See* CP 238-40.

[2] Because QTIP is included in the taxable estate of the second spouse to die under section 2044 of the Internal Revenue Code, that property is sometimes referred to as "section 2044 property." The Department of Revenue, in this Brief, will occasionally use the shorthand term "section 2044 property" to refer to QTIP included in the federal taxable estate of the second spouse to die.

$14,555,320.87. CP 109, Part 2, line 1. This amount was computed by taking the taxable estate of $13,945,734.89 and adding $609,585.98 relating to the federal deduction for state estate taxes. *See* CP 78, part 2, line 3 (showing computation of "taxable estate" on federal return). The Estate then claimed a deduction on its Washington return in the amount of $8,039,555.25. CP 109, Part 2, line. 2b. The deduction was equal to the amount of QTIP included in the Estate's taxable estate. By claiming this deduction on its Washington return, the Estate was able to reduce its Washington taxable estate by over $8 million. *See id.*, part 2, line 3.

The Estate's Washington estate tax return was reviewed by the Department of Revenue ("Department"). Upon examination, the Department denied the $8,039,555.25 deduction claimed on Part 2, line 2b of the state return. A notice of tax due was sent to the Estate, setting out the amount of Washington estate tax owed. CP 110.

The Estate did not pay the amount due. On November 7, 2008, the Department filed "Findings of the Department of Revenue Fixing Tax Due" with the Clerk of the King County Superior Court. CP 1. *See also*, RCW 83.100.150 (authorizing Department to file findings with the probate court regarding the amount of state estate tax due). The Barbara Nelson Estate timely objected to those findings as permitted under RCW 83.100.180. CP 8-19.

C. Procedural History.

After objecting to the Department's findings of additional estate tax due, the matter was consolidated for purposes of discovery and trial with two similar estate tax cases—Estate of Bracken and Estate of Toland. For purposes of the superior court proceedings, the three estates were referred to collectively as the "Consolidated Estates." CP 34.

After the three cases were consolidated for purposes of discovery and trial, the Department and the Consolidated Estates filed cross-motions for summary judgment. CP 44-56 (Department's motion), CP 245-273 (Consolidated Estates' motion). After a hearing, the trial court, the Honorable John P. Erlick, granted the Department's summary judgment motion and denied the Consolidated Estates' motion. CP 1004-1006. The Estate of Barbara Nelson appealed. CP 1077-1084. Shortly thereafter, the Consolidated Estates' filed a motion for reconsideration with the trial court, which was denied. CP 1007-1018 (motion), CP 1085-1086 (order denying motion). The Estate of Barbara Nelson then filed an amended notice of appeal, seeking review of both the order on summary judgment and the denial of the Consolidated Estates' motion for reconsideration. CP. 1089-1098. The Estate of Bracken has filed an appeal with the Washington Supreme Court seeking direct review.[3] The Estate of Toland did not appeal.

IV. ARGUMENT

A. Standard Of Review.

This appeal stems from the grant of summary judgment in favor of the Department of Revenue. The standard of review on appeal from an

[3] The Estate of Bracken's motion for direct review by the Supreme Court is pending.

order on summary judgment is de novo. *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 68, 85 P.3d 346 (2004). The appellate court performs the same inquiry as the trial court in ruling on the motion. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56. "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (quoting *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980)).

When the material facts in a tax refund case are undisputed and the only issues to be resolved are legal in nature, the appellate court reviews the legal conclusions de novo. *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 148, 3 P.3d 741 (2000). The material facts supporting the Department's motion for summary judgment were not disputed. As a result, summary judgment in favor of the Department was appropriate. *See Morgan v. Kinger*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009) ("Where no dispute as to the material facts exist, summary judgment is proper.").

B. The Washington Estate Tax Code Does Not Allow A Deduction Or Exemption For QTIP Included In The Decedent's Taxable Estate Under IRC § 2044.

1. Overview of the Federal estate tax, including the modern concept of "transfer" and the treatment of QTIP.

To better appreciate the legal arguments presented herein, it is helpful to have a general understanding of both the federal estate tax code and the Washington estate tax code.[4] The federal estate tax is set out in Chapter 11 of the Internal Revenue Code.[5] The tax is "imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." IRC § 2001(a). It is well established that the term "transfer" as used in the federal estate tax code is construed broadly and "extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945). Thus, a "transfer" for federal estate tax purposes is not limited to a formal conveyance of property under state law or common law. Rather, "Congress has a wide latitude in the selection of objects of taxation" and may include within the federal estate tax base property that was not formally conveyed upon the death of the decedent. *Id.*

That Congress has wide latitude to look beyond state or common law pertaining to property transactions was conclusively established in *Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940). In discussing the earlier case of *Klein v. United States*, the Court in *Hallock* noted that *Klein* "rejected formal distinctions pertaining to the law of real property as irrelevant criteria in this field of [estate] taxation." *Id.* at 111 (discussing *Klein v. United States*, 283 U.S. 231, 51 S. Ct. 398, 75 L. Ed. 996 (1931)). The Court went on to hold:

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[4] For a more detailed overview of the federal estate tax see Richard B. Stephens et al., FEDERAL ESTATE AND GIFT TAXATION, ¶ 1.02 (8th ed. 2002).

[5] All references to the Internal Revenue Code will be to the Internal Revenue Code of 1986 as amended or renumbered as of January 1, 2005. Relevant portions of the Estate Tax chapter of the Internal Revenue Code are attached hereto as Appendix A.

> The inescapable rationale of [*Klein v. United States*], rendered by a unanimous Court, was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes inter vivos transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor. It refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law.

Id. at 112. *See generally*, 1 Jacob Mertens, THE LAW OF FEDERAL GIFT AND ESTATE TAXATION, §§ 1.02 – 1.04 (1959) (discussing the modern concept of a "transfer" under the federal estate tax code).[6]

Since *Helvering v. Hallock* was decided in 1940, courts have consistently recognized the power of Congress to direct by statute what property will be included in the taxable estate of a decedent. *See e.g.*, *Fernandez v. Wiener*, *supra*; *Commissioner v. Church's Estate*, 335 U.S. 632, 69 S. Ct. 322, 93 L. Ed. 288 (1949); *United States v. Manufacturers National Bank of Detroit*, 363 U.S. 194, 198-200, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960); *United States v. Hemme*, 476 U.S. 558, 571-72, 106 S. Ct. 2071, 90 L. Ed. 2d 538 (1986). As explained in the Mertens treatise on federal gift and estate taxation:

> The modern concept of a transfer, in the constitutional sense, is premised on the recognition that taxation is "eminently practical". In the process of ruling out the "shadowy and intricate distinctions of common law property concepts" . . . the courts have striven to develop a concept of the term 'transfer' which was both broad and flexible. The courts have said that the estate tax provision was constitutional if

[6] A copy of sections 1.02 through 1.04 of the Mertens treatise is attached hereto as Appendix B.

> there was a transfer of economic benefit, use, enjoyment or control at death, and it is now accepted that a passing or transfer of economic benefit is not required, though it may, of itself, justify the imposition of the tax.
>
> . . . .
>
> The modern explanations have been narrowed down to two factors: that decedent had an interest in property at death, and that death became the generating source of definite accessions to the survivor's property rights. His death is the source of assurance to the beneficiaries that their rights are secure. . . . The question is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of secession, but whether the death has brought into being or ripened for the survivors, property rights of such character as to make appropriate the imposition of a tax upon that result to be measured, in whole or in part, by the value of such rights.

Mertens, *supra*, at § 1.04 (footnotes omitted).

The federal estate tax, in simplified terms, is computed on the "taxable estate" of the decedent. IRC § 2001(b).[7] The term "taxable estate" is defined as the gross estate of the decedent less authorized deductions. IRC § 2051. One of the deductions allowed in computing the taxable estate of a decedent is the marital deduction set out in IRC § 2056, which provides that "the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse." IRC § 2056(a). IRC § 2056(b) then sets out a limitation relating to "terminable

[7] The actual computation of the federal tax is somewhat more complicated as a result of the integration of the federal gift tax. For a more detailed explanation of how the federal estate tax is computed, see Richard B. Stephens et al., FEDERAL ESTATE AND GIFT TAXATION, ¶ 2.01[1] (8th ed. 2002).

interests" such as a life estate or other interest that will lapse due to the passing of time or the occurrence or non-occurrence of an event.

The marital deduction was added to the federal estate tax code in 1948. It was originally enacted to "equalize" the disparate estate tax treatment of spouses residing in community property states and those residing in common law property states. *United States v. Stapf*, 375 U.S. 118, 128, 84 S. Ct. 248, 11 L. Ed. 2d 195 (1963). *See also Clayton v. Comm'r*, 976 F.2d 1486, 1491 (5th Cir. 1992).[8] As originally enacted, the marital deduction was limited to fifty percent of the decedent's separate property passing outright to the surviving spouse. Transfers of "terminable interest" property did not qualify for the deduction. Although the deduction was limited both in the amount that could be deducted and the type of property that qualified, it still provided an important estate planning tool for married couples. Separate property passing outright to the surviving spouse, up to the fifty percent limitation, was excluded from the estate tax base of the first spouse to die. However, the property did not escape estate taxation altogether. Rather, "[a]n essential feature of the Marital Deduction from its very beginning . . . was that any property of the first spouse to die that passed untaxed to the surviving spouse should be taxed in the estate of the surviving spouse." *Clayton*, 976 F.2d at 1486.

[8] For a detailed explanation of the history of the marital deduction and the enactment of the QTIP provisions, see Dana R. Irwin, *Removing the Scaffolding: The QTIP Provisions and the Ownership Fiction*, 84 Neb. L. Rev. 571 (2005).

In 1981 Congress made a significant change to the marital deduction by "exempting all transfers between husband and wife . . . subject [only] to rules . . . to insure that the exempted property will be taxed if and when the surviving spouse disposes of it by gratuitous transfers, whether inter vivos or at death." *Clayton*, 976 F.2d at 1492 (internal quotation and citation omitted). In addition to making the deduction unlimited in amount, Congress also liberalized the "terminable interest" rule by creating a special category of terminable interest property—so called "qualified terminable interest property" or "QTIP"—that would qualify for the deduction. Thus, Congress created "an exception-to-the-exception" that permitted certain terminable interest property to pass untaxed to the surviving spouse. *Id.* at 1493.

In order for terminable interest property to qualify for the marital deduction: (1) the property must pass from the decedent to the surviving spouse, (2) the surviving spouse must have the right to receive the income from the property for life, and (3) the executor of the decedent's estate must make an election to have the property treated as QTIP. IRC § 2056(b)(7)(B)(i). As used within the QTIP provisions, "the term 'property' includes an interest in property." IRC § 2056(b)(7)(B)(iii).

The trade-off for allowing the estate of the first spouse to die to deduct QTIP is that the value of the property is treated as passing to the surviving spouse and is included in the surviving spouse's taxable estate when he or she dies. *See* IRC § 2056(b)(7)(A) (QTIP treated as passing to the surviving spouse); IRC § 2044(b)(1)(A) (QTIP included in the gross estate of the surviving spouse). In this way, QTIP does not escape taxation. The tax is only delayed until the surviving spouse dies. *See Clayton*, 976 F.2d at 1492-93 n. 26 (allowing the marital deduction for QTIP "satisfies each of the two objectives [of Congress]—postponing payment of tax and being able to control the disposition of the property . . . .") (quoting H. Rep. No. 97-201, 97th Cong., 1st Sess., at 159-60).

To insure that the qualified terminable interest property is taxed on the death of the surviving spouse, Congress specified that the property "shall be treated as property passing from the decedent." IRC § 2044(c). This "passing" of QTIP from the decedent qualifies as a "transfer" under the federal estate tax code. Not only is the decedent's life estate in the QTIP extinguished upon his or her death, but the death of the surviving spouse also brings about the conversion of the remainder beneficiaries' future interest in the QTIP to a present, unrestricted, fee simple interest. This shift in economic benefit in the assets of the QTIP trust is sufficient to qualify as a transfer under the modern concept of the term. *See generally*, Mertens, *supra*, at § 1.04.

2. Overview of the Washington estate tax and the treatment of QTIP.

The Washington estate tax was enacted in 1981 as a result of Initiative No. 402. *See* Laws of 1981, 2d Ex. Sess., ch. 7. Prior to that, Washington imposed an inheritance tax.[9] The Washington estate tax, as

[9] The Washington inheritance tax was initially enacted in 1901. Laws of 1901, ch. 55. The primary difference between an inheritance tax and an estate tax is how the tax is imposed. *See* 2 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 21.02[1] (3rd ed. 1998). Relevant portions of the Hellerstein treatise are in the record at CP 523-32.

initially enacted, imposed a tax equal to the state death tax credit allowed under IRC § 2011. The amount of the credit (and therefore the amount of the Washington tax) was set out in the table provided at IRC § 2011(b)(1). State estate taxes of this nature are commonly referred to as "pickup" taxes.

In June 2001, Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).[10] That act reduced the amount of the state death tax credit by 25% per year, resulting in the total elimination of the credit by 2005. *See* IRC § 2011(b)(2)(B) (showing phase-out of the state death tax credit). This reduction and eventual elimination of the state death tax credit had a serious impact on states like Washington that employed a "pickup" tax. *See Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 548, 105 P.3d 391 (2005) ("[I]mplementation of EGTRRA essentially ends the estate tax revenue sharing between the federal government and states."). To keep the Washington tax viable, the Legislature needed to uncouple from the pickup tax mechanism and establish a stand alone tax. *Id.* at 551.

In 2005 the Washington Legislature made several significant amendments to the estate tax in reaction to the *Estate of Hemphill* decision. *See* Laws of 2005, ch. 516. These 2005 amendments became effective May 17, 2005.

As amended, RCW 83.100.040 imposes a stand-alone Washington estate tax. That section provides in part that "[a] tax in the amount computed

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[10] Pub. L. No. 107-16, 115 Stat. 73 (2001).

as provided in this section is imposed on every transfer of property located in Washington. For the purposes of this section, any intangible property owned by a resident is located in Washington." The term "property" means "property included in the gross estate." RCW 83.100.020(8). Gross estate, in turn, is defined as "'gross estate' as defined and used in section 2031 of the Internal Revenue Code." RCW 83.100.020(5). Also, the Washington Legislature specified that the term "Internal Revenue Code" means "the United States Internal Revenue Code of 1986, as amended or renumbered as of January 1, 2005." RCW 83.100.020(12).

The tax is computed on a graduated rate from 10% to 19% of the estate's "Washington taxable estate." RCW 83.100.040(2)(a). The term "Washington taxable estate" is defined as "the federal taxable estate, less: (a) One million five hundred thousand dollars for decedents dying before January 1, 2006; and (b) two million dollars for decedents dying on or after January 1, 2006; and (c) the amount of any deduction allowed under RCW 83.100.046." RCW 83.100.020(13). "Federal taxable estate," in turn, is defined as "the taxable estate as determined under chapter 11 of the Internal Revenue Code" without regard to the termination of the federal estate tax or the deduction for state death taxes. RCW 83.100.020(14). Thus, the Washington taxable estate is equal to the taxable estate determined under the Internal Revenue Code after making specified additions and deductions.

Like the federal estate tax, the Washington estate tax is imposed on the <u>transfer</u> of property. *Compare* IRC § 2001(a) ("A tax is hereby imposed on the transfer of the taxable estate of every decedent . . . .") *with* RCW

83.100.040(1) ("A tax . . . is imposed on every transfer of property located in Washington."). Under the Washington law, "transfer" means a "'transfer' as used in section 2001 of the Internal Revenue Code." RCW 83.100.020(11). Thus, the Legislature has clearly established that a "transfer" subject to the Federal estate tax is also a "transfer" subject to the Washington tax.[11] Moreover, because "transfer" has an identical meaning under both the federal and Washington estate tax codes, the Washington tax is not limited to formal conveyances of property owned by the decedent. Rather, the Washington tax– like its federal counterpart– "extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property." *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945).

3. Under the modern concept of "transfer," a taxable transfer occurred under IRC § 2044 when Barbara Nelson died in 2006

The Estate, apparently unaware of the holding in *Fernandez v. Wiener* or the modern concept of "transfer," argues that "the state cannot impose an estate tax on property the decedent did not own and therefore could not transfer." Br. of App. at 20. The Estate is simply wrong.

Under the modern understanding of what constitutes a "transfer" for estate tax purposes, the formal conveyance of property owned by the decedent is not required. Instead, it is well established that Congress has

[11] The Legislature has specified two exceptions in RCW 83.100.020(11). First, a transfer under the Washington estate tax does not include "a qualifying heir disposing of an interest in property qualifying for a deduction under RCW 83.100.046." Second, a transfer under the Washington tax does not include "a qualified heir . . . ceasing to use the property for farming purposes." Neither exception applies in this case.

the power to direct by statute what property will be included in the taxable estate of a decedent so long as "that decedent had an interest in property at death, and that death became the generating source of definite accessions to the survivor's property rights." Mertens, *supra*, at § 1.04. The passing of QTIP under IRC § 2044 undoubtedly qualifies as a "transfer." As noted above, a QTIP trust established by the first spouse to die creates a life estate for the benefit of the surviving spouse and creates a future interest in the assets of the QTIP trust for the benefit of the remainder beneficiaries. When the second spouse dies, the life estate is extinguished and the remainder beneficiaries receive a present interest in the property. The death of the second spouse brings on a shift in the economic benefit of the QTIP that Congress is permitted to include in the estate tax base of the decedent. Congress has expressly exercised that power in IRC § 2044. The Estate's assertion to the contrary is simply ill-informed and incorrect as a matter of law.

Not only does the Estate misunderstand the concept of "transfer" embodied in the federal and Washington estate tax codes, it also ignores the statutory treatment of QTIP set out in IRC §§ 2056(b)(7) and 2044. More specifically, the Estate ignores:

- IRC § 2056(b)(7)(A)(i), which provides that QTIP is treated as passing to the surviving spouse when the first spouse dies;
- IRC § 2044(b)(1)(A), which provides that QTIP passing to the surviving spouse is included in that spouse's gross estate when he or she dies; and
- IRC § 2044(c), which provides that QTIP is treated as passing from the surviving spouse when he or she dies.

Under these provisions, the "taxable transfer" of QTIP occurs when the second spouse dies.

It is precisely because QTIP is treated as passing through the surviving spouse under IRC §§ 2056(b)(7)(A) and 2044(c) that the federal estate tax is deferred until the surviving spouse dies. Moreover, it is clear under the federal estate tax code that QTIP is treated as passing at two distinct points in time: when the first spouse dies and again when the surviving spouse dies. No tax is owed on the first transfer as a result of the marital deduction. IRC § 2056(b)(7). However, estate tax is owed on the second transfer. IRC § 2044.

The same treatment applies under the Washington tax. The Legislature has incorporated the federal definition of "taxable estate" into the Washington tax. *See* RCW 83.100.020(14) (defining "federal taxable estate"). The federal taxable estate of a surviving spouse "as determined under chapter 11 of the Internal Revenue Code" includes the value of QTIP passing under IRC § 2044. *See* IRC § 2044(b)(1)(A) (the value of the gross estate shall include the value of any property to which a deduction was allowed with respect to the transfer of the property to the decedent under IRC § 2056(b)(7)); IRC § 2051 (defining taxable estate as gross estate less authorized deductions). Thus, the term "federal taxable estate" as defined in RCW 83.100.020(14) includes QTIP passing when the second spouse dies. Because the QTIP is included in the "federal taxable estate" of the second spouse to die, it is also included in the Washington taxable estate. *See* RCW 83.100.020(13) (defining

"Washington taxable estate" as "the federal taxable estate" less certain deductions not related to QTIP). To argue otherwise is to ignore the plain and obvious meaning of both the Washington estate tax code and the federal estate tax code.

Finally, the fact that Congress has plenary power to determine when a taxable "transfer" will occur under the federal estate tax was conclusively established long ago in *Fernandez v. Wiener*, 326 U.S. 340, 66 S. Ct. 178, 90 L. Ed. 116 (1945). *Fernandez* involved a 1942 amendment to the federal estate tax whereby the value of community property, including the surviving spouse's community property interest, was included in the gross estate of the first spouse to die. *Id.* at 342. The heirs of a Louisiana resident decedent challenged the 1942 amendment, arguing that inclusion of the surviving spouse's community property interest in the gross estate of the deceased spouse violated due process and several other federal constitutional provisions. *Id.* at 342-43. According to the heirs, the 1942 amendment that taxed "the entire value of the community property on the death of either spouse is a denial of due process because the death of neither operates to transfer, relinquish or enlarge any legal or economic interest in the property of the other spouse." *Id* at 346. Moreover, the community property interests included in the decedent's gross estate had been created or established before the 1942 amendment was enacted.

In rejecting the heirs' constitutional claims, the Court in *Fernandez* first recognized that Congress has broad authority to define the taxable event upon which the estate tax is imposed and to dictate what property interests shall be included in the taxable estate of a decedent. *Fernandez*, 326 U.S. at 352-54. The Court then turned to the due process challenge. Quoting *Griswold v. Helvering*, 290 U.S. 56, 58, 54 S. Ct. 5, 78 L. Ed. 166 (1933), an estate tax case involving property held as joint tenants by a husband and wife, the Court in *Fernandez* acknowledged that "[u]nder the statute the death of the decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax." *Id.* at 354-55 (emphasis added) (quoting *Griswold*). Applying this same reasoning to state community property law, the Court held that "[s]imilarly, a tax upon the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process." *Id.* at 355 (citing *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 S. Ct. 123, 73 L. Ed. 410 (1929)).[12]

In addition to firmly establishing the power of Congress to determine when a taxable "transfer" occurs for estate tax purposes, *Fernandez* also effectively overruled *Coolidge v. Long*, 282 U.S. 582, 51 S. Ct. 206, 75 L. Ed. 562 (1931). *See Fernandez*, 326 U.S. at 357 (expressly limiting the holding in *Coolidge v. Long*). *Coolidge* was an estate tax case decided during the "*Lochner* era" when the United States

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[12] A few years after *Fernandez* was decided, Congress again amended the federal estate tax, striking the provision at issue in *Fernandez* and enacting the marital deduction in an effort to "equalize" the disparate estate tax treatment of spouses residing in community property states and those residing in common law property states. *United States v. Stapf*, 375 U.S. 118, 128, 84 S. Ct. 248, 11 L. Ed. 2d 195 (1963).

Supreme Court used the Due Process clause to undue federal and state economic regulation that the Court deemed unwise or unnecessary.[13] Substantive Due Process cases from the *Lochner* era are no longer considered authoritative. *See United States v. Carlton*, 512 U.S. 26, 34, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (cases from the *Lochner* era, such as *Coolidge v. Long*, *Nichols v. Coolidge*,[14] and *Blodgett v. Holden*,[15] "were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded.") (Internal quotation and citation omitted); *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 228, 143 P.3d 571 (2006).

The Estate specifically relies on *Coolidge v. Long* to support its "no taxable transfer" argument. Br. of App. at 17-18. However, *Coolidge* and other *Lochner* era cases have no relevance under contemporary Due Process analysis or under the modern concept of "transfer." The Estate simply ignores the post-*Lochner* cases that have effectively overruled *Coolidge* and that have established the modern concept of "transfer" for estate tax purposes. Simply put, Congress has the power to determine by statute when a taxable "transfer" of QTIP occurs, and has exercised that

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[13] The "*Lochner* era" covered roughly the years 1900 to 1936. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 227-28, 143 P.3d 571 (2006). It was the U.S. Supreme Court's affirmance of the Washington Supreme Court's decision in *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083 (1936), *aff'd sub. nom West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), that signaled the end of the *Lochner* era. *Amunrud*, 158 Wn.2d at 227 n. 6. It is now well established that the substantive due process jurisprudence espoused during the *Lockner* era "has been soundly rejected by the United States Supreme Court and this court." *Amunrud*, 158 Wn.2d at 228.

[14] 274 U.S. 531, 47 S. Ct. 710, 71 L. Ed. 1184 (1927).

[15] 275 U.S. 142, 48 S. Ct. 105, 72 L. Ed. 206 (1927).

power in IRC § 2044. Moreover, because QTIP passing from the surviving spouse under IRC § 2044(c) qualifies as a taxable transfer subject to the federal estate tax under IRC § 2001(a), it also qualifies as a taxable "transfer" under the Washington estate tax. The Estate's arguments to the contrary border on the frivolous and should be flatly rejected.

4. The Washington estate tax code contains no deduction or exemption for Section 2044 property included in the taxable estate of a decedent.

The Washington estate tax code contains no express deduction or exemption for section 2044 property included in the taxable estate of a decedent. The Estate, recognizing that there is no express deduction or exemption that applies, argues instead that the Legislature must have, *sub silentio*, intended to exclude section 2044 property. *See* Br. of App. at 23-28 (arguing that the "conclusion" that section 2044 property is included in the Washington taxable estate of the second spouse to die "is wrong for a multitude of reasons."). The Estate's reasoning and analysis is flawed.

In construing the meaning of a statute, the appropriate starting point is the statutory language itself. *Enterprise Leasing, Inc. v. City of Tacoma, Finance Dep't.*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999). In the present case, because the controlling statutes are clear and unambiguous, there is no need to consult extrinsic sources. As discussed above, the Washington tax is imposed under RCW 83.100.040(1) "on every transfer of property located in Washington." "Transfer" means a "transfer" under the federal estate tax code. *See* RCW 83.100.020(11) (defining "transfer"). Under the modern concept of "transfer" embodied in the federal estate tax code, a formal conveyance of property from the decedent is not required. So long as there is a "shift in economic benefit" brought about by the death of the decedent, Congress is permitted to include the value of the property associated with the shifting economic benefit in the estate tax base of the decedent.

The Washington tax is calculated on the "Washington taxable estate" of the decedent, RCW 83.100.040(2)(a), which is statutorily defined as "the federal taxable estate" less specified deductions. RCW 83.100.020(13). QTIP passing under IRC § 2044 is included in the federal taxable estate of the second spouse to die. IRC § 2044(c). Moreover, none of the deductions set out in RCW 83.100.020(13) apply to QTIP. Thus, it is beyond any reasonable dispute that QTIP passing under IRC § 2044 is included as part of the Washington taxable estate subject to the Washington tax. As a matter of statutory law, there is no question that the QTIP deduction claimed by the Estate on its Washington return was not proper.

Additionally, the Estate's analysis of RCW 83.100.040 is seriously flawed. *See* Br. of App. at 23-27. While both the Estate and the Department agree that the Washington tax is imposed on the "transfer" of property of the decedent, the Estate wishes to restrict the term "transfer" to a narrow property law concept. However, as noted above, the Washington Legislature has specifically defined the term "transfer" to mean a "transfer" subject to the federal estate tax. RCW 83.100.020(11). By doing so, the Legislature has incorporated the modern concept of "transfer" embodied in *Helvering v. Hallock* and *Fernandez v. Wiener*. In short, the Estate's statutory construction argument is built entirely on the false premise that the QTIP at issue in this case did not "transfer" when Ms. Nelson died. Because the Estate's initial premise is wrong, its proposed construction of the Washington estate tax code, and specifically RCW 83.100.040, is also incorrect.

Based on the undisputed facts and the unambiguous law that pertains to this case, the QTIP included in the Estate's taxable estate under IRC § 2044 was also part of the Estate's Washington taxable estate. The Estate simply claimed a deduction on its Washington estate tax return that does not exist, and the Department correctly disallowed that deduction. The Estate's claim to the contrary is incorrect as a matter of law.

5. The Washington Supreme Court's decision in *In re McGrath's Estate* does not compel a different result.

The estate relies heavily on the 1937 case of *In re McGrath's Estate*, 191 Wash. 496, 71 P.2d 395 (1937). Br. of App. at 14-16. That case was decided before *Helvering v. Hallock* and *Fernandez v. Wiener*, and relied in part on two cases that were subsequently overruled. *See In re McGrath's Estate*, 191 Wash. at 503 (discussing *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39, 56 S. Ct. 74, 80 L. Ed. 29 (1935), *overruled by Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940), and *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48, 56 S. Ct. 78, 80 L. Ed. 35 (1935), *overruled by Helvering v. Hallock*, 309 U.S. 106, 60 S. Ct. 444, 84 L. Ed. 604 (1940)). But even with this disability, the Washington Supreme Court's decision in *McGrath's Estate* actually supports the Department, not the Estate.

The pertinent facts in *McGrath's Estate* involve William A. McGrath, president of McGrath Candy Company, who died in May 1935. *In re McGrath*'s *Estate*, 191 Wash. at 497. At the time of his death there were three insurance policies on his life that named McGrath Candy Company as the beneficiary. *Id.* One of the insurance policies (the "Union Central Life" policy) was taken out by Mr. McGrath and he reserved the right to change the beneficiary of that policy. *Id.* at 501. The other two policies (the "Northwestern Mutual" policies) were taken out by the candy company and Mr. McGrath had no right to change the beneficiary "or do anything with relation to them." *Id.* at 501-02.

The Washington Supreme Court found that the proceeds of the Union Central Life policy were properly subject to the Washington inheritance tax upon Mr. McGrath's death, while the proceeds of the Northwestern Mutual policies were not. *Id.* at 502-03. The distinguishing factor, according to the Court, was that Mr. McGrath had no right or interest in the two Northwestern Mutual policies—which were taken out and paid for by McGrath Candy Company—but did have some identifiable rights in the Union Central policy—which Mr. McGrath took out and retained the right to change the beneficiary.

In distinguishing the Northwestern Mutual policies from the Union Central policy, the Court did not hold that a formal conveyance of property owned by the decedent was required, or that the common law of property transfers controlled. Rather, the Court distinguished between the policies that Mr. McGrath had no right or interest in and the policy that Mr. McGrath had some identifiable interest in. With respect to the Union Central Policy, Mr. McGrath's death extinguished his right to change the beneficiary, thereby causing a "shifting of economic benefit." *Id.* at 504.

Thus, even though *McGrath's Estate* was decided before *Helvering* v. *Hallock* and *Fernandez v. Wiener*, the Washington Supreme Court's analysis was consistent with the modern concept of transfer embodied in those cases. Because there was a "shifting of economic benefit" in the Union Central insurance policy brought about by Mr. McGrath's death, the Washington Legislature had the plenary power to include the value of the property in the decedent's inheritance tax base. *In accord*, *West v. Oklahoma Tax Commission*, 334 U.S. 717, 727, 68 S. Ct. 1223, 92 L. Ed. 1676 (1948) (Oklahoma had power to include trust property in estate of decedent for purposes of the Oklahoma tax even though decedent was not legal owner of the property).[16]

There can be no serious dispute in the present case that a "shifting of economic benefit" occurred with respect to the assets in the two QTIP trusts upon the death of Barbara Nelson in 2006. Not only was Ms. Nelson's life estate in those assets extinguished, but the interest of the remainder beneficiaries changed from a future interest to a present, fee

[16] *West v. Oklahoma Tax Commission* is another case where the United States Supreme Court has emphasized that a formal conveyance of property is not required under the modern concept of "transfer." Referring to the Oklahoma inheritance tax at issue, the Court stated that "[i]n this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer." *West*, 334 U.S. at 727.

simple interest. This shifting in economic benefit is subject to estate tax under the modern concept of "transfer." Thus, while certain aspects of *McGrath's Estate* are no longer good law—namely the due process analysis at pages 507 through 510 of that decision—the "shifting of economic benefit" test employed by the Court is consistent with the modern concept of transfer.[17]

6. The Indiana Court of Appeals' decision in *Estate of Morris* does not compel a different result.

The Estate also relies on the Indiana Court of Appeals' decision in *Indiana Dep't of State Revenue v. Estate of Morris*, 486 N.E. 2d 1100 (Ind. Ct. App. 1986), to support its "no taxable transfer" argument. Br. of App. at 19. *Estate of Morris* is easily distinguishable and is not controlling in this case.

Estate of Morris involved the Indiana inheritance tax and whether property contributed to a marital trust created by the first spouse to die was subject to the Indiana tax upon the death of the second spouse where the second spouse held a power of appointment over the trust property. *Id.* at 1100. The case did not involve QTIP. In fact, the first spouse to die, Nola Morris, died in July 1977, almost four years before Congress enacted the QTIP provisions in 1981. As a result, the marital trust at issue in *Estate of*

[17] The Washington Supreme Court's due process analysis in *McGrath's Estate* relied heavily on *Coolidge v. Long* and other *Lochner* era cases. *Id.* at 507-509 (quoting or citing *Coolidge v. Long*, *Nichols v. Coolidge*, *Blodgett v. Holden*, and *Untermyer v. Anderson*). These cases are no longer considered authoritative. *United States v. Carlton*, 512 U.S. 26, 34, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994). Moreover, the Washington Supreme Court has specifically limited the holding in *McGrath's Estate* as it pertains to retroactive tax statutes and due process analysis. *Japan Line v. McCaffree*, 88 Wn. 2d 93, 96-97, 558 P.2d 211 (1977).

Morris was not a QTIP trust, and the trust property was not treated as passing under IRC § 2044 when the surviving spouse died.

In addition, *Estate of Morris* involved application of a specific Indiana statute, Indiana Code section 6-4.1-2-4, which imposed the Indiana inheritance tax on specific "types of property interest transfers."[18] Unlike the Washington estate tax at issue in this case, the Indiana inheritance tax did not apply to "every transfer of property" and did not define "transfer" as a transfer under the federal estate tax code. Instead, the Indiana Legislature set out a list of the specific types of transfers subject to the Indiana tax. *Estate of Morris*, 486 N.E. 2d. at 1102 ("6-4.1-2-4 defines those transfers that are taxable."). Moreover, the Indiana tax "is based upon the ownership theory." *Id.* at 1101 (citing *Matter of Estate of Bannon*, 358 N.E. 2d 215 (Ind. Ct. App. 1976)). Thus, the Indiana Legislature has not adopted the modern concept of transfer embodied in the federal estate tax code, which does not require formal ownership of property by the decedent.

Applying the plain language of the Indiana statute to the facts presented, the Indiana Court of Appeals held that no taxable transfer occurred. *Id.* at 1102. Other courts, analyzing similar facts, have come to the opposite conclusion based on the specific state statute at issue. *See, e.g.*, *Naylor v. Brown*, 353 A.2d 709 (Conn. 1974) (power of appointment over the residue of a marital deduction trust was a taxable transfer under Connecticut's estate tax when the second spouse died); *Montague v. South*

[18] A copy of Ind. Code § 6-4.1-2-4 is attached as Appendix C.

Carolina Tax Commission, 103 S.E. 2d 769 (S.C. 1958) (under South Carolina law, property left to testator's wife with a power to dispose of the property by will was taxable upon the wife's death even though she failed to exercise the power). These cases are not necessarily inconsistent. Clearly, the legislatures of the various states have the power to include, or not include, within the estate tax base of a resident decedent the value of property subject to a power of appointment. That the Indiana Legislature has taken a different approach from several of its sister states is not surprising. More importantly, the Indiana approach is not constitutionally mandated. *See Graves v. Schmidlapp*, 315 U.S. 657, 62 S. Ct. 870, 86 L. Ed. 1097 (1942) (upholding New York's estate tax on the value of property held in trust and passing under a general power of appointment exercised by the New York resident decedent).

The Estate's assertion that *Estate of Morris* is somehow relevant to the proper analysis of the Washington estate tax code is simply not true. The Indiana Court of Appeals (1) did not address the federal QTIP provisions set out in IRC §§ 2056(b)(7) and 2044, and (2) did not address the statutory definition of "transfer" set out in RCW 83.100.020(11). Moreover, it is evident that Washington and Indiana employ different estate tax concepts, and use different language in defining the property subject to tax. Thus, *Estate of Morris* is clearly distinguishable and has no bearing on this case.

7. The federal estate tax cases cited by the Estate do not compel a different result.

The Estate also argues that federal estate tax cases involving the value of QTIP are controlling and establish that "no 'transfer' of assets in a QTIP trust occurs upon the death of the surviving spouse." Br. of App. at 28-29. The Estate relies on *Estate of Bonner v. U.S.*, 84 F.3d 196 (5th Cir. 1996), and *Estate of Mellinger v. Comm'r*, 112 T.C. 26 (1999). However, neither case stands for the proposition being advanced by the Estate. The Estate simply misunderstands the holdings of the two federal tax cases on which it relies.

Estate of Bonner deals with the value of QTIP and whether an estate can claim a "discount . . . based on the fact that [the terminable interest property at issue] was a fractional undivided interest." *Estate of Bonner*, 84 F. 3d at 197. The Court held that the discount was permitted. In so holding, the Court distinguished the imposition of the estate tax on the QTIP from the value of the QTIP. While the assets in the QTIP trust are "taxed as if they passed through Bonner's estate," the "valuation of the assets should reflect [the] reality" that what passed was a fractional interest. *Id.* at 199.

Estate of Mellinger, like *Estate of Bonner*, deals with the value of QTIP. In *Mellinger*, the Tax Court held that the shares of stock owned by the decedent and included in her gross estate under IRC § 2033 did not merge with shares of the same stock held in a QTIP trust established by the decedent's predeceased spouse. *Estate of Mellinger*, 112 T.C. at 26.

Because the shares did not "merge," the estate was able to value the stock as two minority blocks rather than one majority block. *Id.* at 34-35.

In the present case, there is no dispute regarding the value of the QTIP that passed when Ms. Nelson died. As a result, *Estate of Bonner* and *Estate of Mellinger* add nothing of significance to the legal issues in dispute. The Estate simply confuses the "transfer" of QTIP with the "value" of QTIP. *See generally*, Richard B. Stephens et al., FEDERAL ESTATE AND GIFT TAXATION, ¶ 4.16 at notes 20-23 and accompanying text (8th ed. 2002) (discussing *Bonner* and *Mellinger*).

8. The Estate's "no taxable transfer" argument is inconsistent with its federal estate tax filing.

The Estate's argument that no taxable transfer occurred when Ms. Nelson died is also inconsistent with the fact that it paid federal estate tax on the QTIP at issue. If no taxable transfer occurred when Ms. Nelson died, the Estate would not be subject to the <u>federal</u> estate tax on the QTIP. *See* IRC § 2001(a) (federal estate tax "is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.") The Estate never directly addresses this inconsistency. Instead, the Estate simply assumes that a taxable "transfer" under the Washington estate tax code must mean something different from a taxable "transfer" under the federal estate tax code. RCW 83.100.020(11), which defines "transfer" for Washington estate tax purposes, clearly provides otherwise.

C. The Washington Estate Tax As Amended In 2005 Does Not Impose An Unconstitutional, Retroactive, Tax On QTIP Included In The Decedent's Taxable Estate.

The Estate argues that imposing the Washington estate tax on QTIP included in decedent's taxable estate under IRC § 2044 results in an unconstitutional retroactive tax. Br. of App. at 30-35. The Estate relies on flawed reasoning.

1. The 2005 amendments to the estate tax did not create a "new" tax.

To jump-start its "retroactivity" argument, the Estate characterizes the 2005 amendments to the Washington estate tax as creating a "new stand-alone estate tax." Br. of App. at 7-8. This characterization is misleading. While the Legislature amended the manner in which the tax is computed—changing from a pickup tax calculation to a stand-alone calculation—that does not equate to the repeal and replacement of the tax with a "new" tax. *Compare* Laws of 1981, 2d Ex. Sess., ch. 7 (replacing the former Washington inheritance tax with the current estate tax) *with* Laws of 2005, ch. 516 (amending the Washington estate tax).

More importantly, even if the tax were characterized as a "new" tax, it certainly is not a "wholly new" or "novel" tax. *See United States v. Carlton*, 512 U.S. 26, 34, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) (discussing possible due process limit on a "wholly new tax."); *Japan Line v. McCaffree*, 88 Wn. 2d 93, 96-98, 558 P.2d 211 (1977) (discussing possible due process limit on a "novel" tax.). While the method of computing the tax is new, the tax itself is not. The state of Washington has imposed an estate tax since 1981 and, before that, imposed an inheritance tax going back to 1901. Clearly, "the subject matter [has] previously been taxed." *Japan Line*, 88 Wn. 2d at 98.

It is also noteworthy that the 2005 statutory change from a pickup tax calculation to a stand-alone tax calculation did not materially affect the Washington estate tax treatment of QTIP. Under the former pickup tax calculation, (1) QTIP deducted under IRC § 2056(b)(7) was not part of the tax base used to compute the Washington tax; and (2) QTIP included in the taxable estate under IRC § 2044 was part of the tax base used to compute the tax. This is so because the pickup tax calculation was based on the "adjusted taxable estate" of the decedent. *See* IRC § 2011(b)(1) (state death tax credit table) and IRC § 2011(b)(3) (defining "adjusted taxable estate" as "the taxable estate reduced by $60,000."). Therefore, QTIP excluded from the base under IRC § 2056(b)(7) was not subject to the Washington tax, while QTIP included in the base under IRC § 2044 was subject to the Washington tax.[19] This is not materially different from the treatment of QTIP under the current stand-alone tax calculation set out in RCW 83.100.040(1). What has changed is the method and rates used to

[19] This can be shown mathematically with reference to the state death tax credit table found at IRC § 2011(b)(1) (2005). That table sets out the amount of the state death tax credit and, therefore, the amount of the state "pickup" tax owed under former RCW 83.100.030(1). If, for example, the first spouse died with an adjusted taxable estate of $4,040,000, the pickup tax under IRC § 2011(b)(1) was $290,800. But if that same spouse claimed a $2,000,000 QTIP deduction under IRC § 2056(b)(7), the adjusted taxable estate, and pickup tax owed, were reduced to $2,040,000 and $106,800 respectively. Thus, by claiming a $2,000,000 QTIP deduction, the pickup tax imposed on the estate of the first spouse to die was reduced by $184,000. [$290,800 – $106,800 = $184,000].

calculate the tax.

2. The tax is not applied retroactively.

There is also no merit to the Estate's argument that the Washington estate tax operates retroactively. The stand-alone estate tax imposed by RCW 83.100.040 applies to decedents dying on or after the effective date of the 2005 amendments to the Washington estate tax act. The tax is imposed on the Washington taxable estate computed at the date of death. This includes QTIP passing from the decedent under IRC § 2044.

It is well established that an estate tax "does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *United States v. Manufacturers National Bank of Detroit*, 363 U.S. 194, 200, 80 S. Ct. 1103, 4 L. Ed. 2d 1158 (1960) (quoting *United States v. Jacobs*, 306 U.S. 363, 367, 59 S. Ct. 551, 83 L. Ed. 763 (1939)). *In accord, State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973) (a statute is not retroactive merely "because some of the requisites for its actions are drawn from a time antecedent to its passage."). In the present case, the life estate Barbara Nelson held in the two QTIP trusts was extinguished upon her death in 2006, and that property passed in fee simple to the remainder beneficiaries.[20] Ms. Nelson's death was the

[20] Because Barbara held a limited testamentary power of appointment over the QTIP trust assets, see CP 214-15, those assets actually passed to the remainder beneficiaries under Barbara's will, not William's will. The Estate ignores this fact and, instead, incorrectly argues that "William's Last Will and Testament . . . directed the ultimate disposition of the assets in [the QTIP] Trusts." Br. of App., p. 5. In any event, it is not material to the determination of this case when or how the QTIP passed under state or common law relating to estates and trusts since, for estate tax purposes, the property is

"crucial last step in what Congress can reasonably treat as a testamentary disposition" under IRC § 2044. *Manufacturer's National Bank*, 363 U.S. at 198. That "crucial last step" occurred after the 2005 legislation became effective. Thus, the estate tax imposed on that testamentary disposition was not retroactive.

The Estate's "retroactivity" argument is built on the false premise that the "taxable 'transfer' occurred when the rights of the remainder beneficiaries of William's Trusts were vested at the time of William's death." Br. of App. at 29. The Estate is simply incorrect. Under the federal and Washington estate tax codes, the "taxable transfer" occurred when Barbara Nelson died in 2006. The Estate's misunderstanding of how the federal and Washington estate tax codes operate does not make the Washington law retroactive.

3. The Washington estate tax does not violate the Impairment Clause.

The Estate's claim that the Washington estate tax violates the impairment clause is also unfounded. Article I, section 10 of the United States Constitution provides in part that "No state shall . . . pass any . . . law impairing the obligation of contracts . . . ." The Washington constitution contains a similar prohibition: "No . . . law impairing the obligation of contracts shall ever be passed." Const. art. I, § 23. These

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treated under IRC § 2044 as passing from Ms. Nelson to the remainder beneficiaries when Ms. Nelson died.

constitutional provisions have been interpreted to be coexistive. *Tyrpak v. Daniels*, 124 Wn.2d 146, 151, 874 P.2d 1374 (1994).

The Impairment Clause—sometimes referred to as the "Contracts Clause"—"is applicable only if the legislative act complained of impairs a contractual relationship." *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 145, 750 P.2d 254 (1987). In determining whether legislation impermissibly impairs a contractual relationship, the reviewing court must determine (1) whether a contractual relationship exists, (2) whether the legislation at issue substantially impairs that contractual relationship, and, if so, (3) whether the substantial impairment is reasonable and necessary to serve a legitimate public purpose. *Pierce County v. State*, 159 Wn.2d 16, 28, 148 P.3d 1002 (2006). The last prong is a balancing of interests and recognizes that substantial impairment may still be valid if the state has "a significant and legitimate public purpose behind the regulation." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 74 L. Ed.2d 569 (1983).

Applying the three-part Impairment Clause test to the facts in this case, there is no constitutional violation. As to the first element, the Washington Supreme Court, in *Caritas Servs., Inc. v. Dep't of Soc. and Health Services*, emphasized that a "contract" for purposes of the Impairment Clause "must be a 'contract' in the usual sense of [that] word, that is, an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts." *Caritas Servs.*, 123 Wn.2d 391, 403, 896 P.2d 28 (1994) (internal quotations and citation omitted). In the present case, the QTIP trusts created when Mr. Nelson died were not part of any "agreement of two or more minds, upon sufficient consideration." Instead, the trusts were created to accomplish a testamentary gift of Mr. Nelson's property.

A gift is not a contract in the usual sense. *Oman v. Yates*, 70 Wn.2d 181, 185-86, 422 P.2d 489 (1967) ("owing to the absence of consideration, a gift inter vivos does not come within the legal definition of a contract . . . .") (quoting 24 Am. Jur., *Gifts* § 11 (1939)). Likewise, a trust created to complete a testamentary gift is not a "contract in the usual sense." *See generally* Restatement (Third) of Trusts, § 2 (2003) (defining trusts). Because the Impairment Clause applies to contracts, not gifts, the Estate fails the first element. *See General Motors Corp. v. Romein*, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992) (no violation of Impairment Clause where appellants failed to make threshold showing that a contractual right existed).

The Estate has also not established that the Washington estate tax imposes a "substantial impairment." An "impairment is substantial if the complaining party relied on the supplanted part of the contract." *Margola Associates v. Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). Moreover, "[a] contract is not considered impaired by a statute in force when the contract was made, as parties are presumed to enter into contracts in contemplation of existing law." *Shoreline Community College District No. 7 v. Employment Security Department*, 120 Wn.2d 394, 410, 842 P.2d 938 (1992). In the present case, the Washington estate tax treatment of

QTIP under the current stand-alone tax calculation and the former pickup tax calculation is not materially different. Thus, it is reasonable to conclude that Mr. Nelson, in creating the QTIP trusts as part of his estate plan, was aware that the qualified terminable interest property would be subject to Washington estate tax upon the death of Barbara Nelson. *See* CP 221 (William Nelson's will directs executor to elect QTIP treatment only "after considering the death tax consequences to my estate and my spouse's estate."). As a result, there is no substantial impairment. *See* *Margola Associates*, 121 Wn.2d at 653 ("a party who enters into a contract regarding an activity already regulated in the particular to which he now objects is deemed to have contracted subject to further legislation upon the same topic.") (Internal quotations and citations omitted).

Finally, in applying the third prong, the balancing of interests weigh most heavily in favor of the state legislation and against its invalidation. Washington has imposed an estate tax or an inheritance tax since 1901. The current estate tax has been in existence since 1981. It cannot come as a surprise to a Washington resident decedent with an estate sufficient to qualify for the estate tax that tax is owed. Moreover, the estate of William Nelson elected, and accepted, the benefit of the QTIP deduction when it filed its federal and Washington estate tax returns. The Estate simply ignores or minimizes the tax benefit received by the William Nelson's estate in an effort to avoid paying the Washington tax on the value of the QTIP passing when Barbara Nelson died. Thus, even if application of the Washington tax under the facts of this case qualifies as "impairment," it is a minimal impairment under *Margola Associates* and *Shoreline Community College.*

By contrast, the state's sovereign authority and responsibility to provide for the general welfare of its citizens through its taxing power is vitally important. The purpose of the Washington estate tax is to fund education. RCW 83.100.220, .230. Providing for education is one of the most important functions of government. *See* Const. art. IX, § 1. Given the important justification for the tax—to fund education—when balanced against the almost inconsequential "impairment" the Estate is claiming, it is evident that the Estate also fails the third prong of the three part test.

4. The Washington estate tax does not violate the Due Process Clause.

The Estate also suggests that the "retroactive" Washington estate tax violates its Due Process rights. Br. of App. at p. 34. Again, the Estate is wrong.

First and foremost, the tax is not retroactive. The stand-alone estate tax imposed by RCW 83.100.040 applies to decedents dying on or after the effective date of the 2005 amendments to the Washington estate tax act, which includes Barbara Nelson who died on October 15, 2006. The Estate's arguments concerning retroactivity simply—and incorrectly—assume that the "taxable transfer" occurs when the first spouse dies. The Estate's misunderstanding of the law does not make it retroactive.

Furthermore, even assuming *arguendo* that the 2005 amendments to the Washington estate tax applied retroactively, there would still be no violation of due process. Modern due process precedent of the United States Supreme Court involving retroactive taxation, most notably *United States v. Carlton*, 512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), refutes any notion that the Due Process Clause prohibits or imposes any fixed limit on the retroactive reach of tax statutes. Rather, if the retroactive statute "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Id.* at 30-31. *See also W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 602-03, 973 P.2d 1011 (1999), *cert. denied*, 528 U.S. 950 (1999) (analyzing and applying *Carlton*).

Here, there can be no serious dispute that the 2005 amendments to the Washington estate tax are supported by a legitimate legislative purpose furthered by rational means. The Legislature amended the tax to fix the significant problem created when Congress enacted the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). *See Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 548, 105 P.3d 391 (2005) ("[I]mplementation of EGTRRA essentially ends the estate tax revenue sharing between the federal government and states."). To keep the Washington tax viable, the Legislature needed to uncouple from the pickup tax mechanism and establish a stand alone tax. *Id.* at 551. This was precisely the purpose for the 2005 amendments. *See* Laws of 2005, ch. 516, § 1. Amending the estate tax in the manner it did is undoubtedly a rational means of achieving the legitimate legislative purpose of maintaining a viable state estate tax. As such, the 2005 amendments (even if retroactive) do not run afoul of the Due Process Clause.

D. The Administrative Rules Adopted By The Department In 2006 Do Not Provide An "Alternative" Basis For Granting A Deduction Of QTIP.

The final argument advanced by the Estate asserts that the QTIP deduction it claimed on its Washington estate tax return is authorized by Department administrative rules. Br. of App. at 36-41. The Estate relies on former WAC 458-57-105(3)(q)(vi) and former WAC 458-57-115(2)(d)(vi).[21] However, neither of these rules applies under the facts of this case, and neither rule provides an "alternative" basis for allowing a deduction of QTIP included in the federal taxable estate of the second spouse to die.

1. The separate Washington QTIP election.

While the Washington Legislature has not established a deduction or exemption for QTIP included in the federal taxable estate of a decedent, the Legislature has authorized a separate Washington QTIP election that, if elected, would require an adjustment in computing the Washington taxable estate. More specifically, RCW 83.100.047(1) provides:

> If the federal taxable estate on the federal return is determined by making an election under section 2056 . . . of the Internal Revenue Code, or if no federal return is required to be filed, the department may provide by rule for a separate election on the Washington return, consistent with section 2056 . . . of the Internal Revenue Code.

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[21] WAC 458-57-105 and WAC 458-57-115 were initially promulgated in 2006 as part of a significant amendment to WAC 458-57, and both were amended in 2009. The Estate relies on the 2006 version of these rules, a copy of which is attached as Appendix D.

Under this provision, the separate Washington QTIP election is only available to an estate of a spouse dying on or after May 17, 2005 (the effective date of RCW 83.100.047) who makes a federal QTIP election under IRC § 2056 or who is not required to file a federal estate tax return.[22] If a separate Washington election is made, the Washington taxable estate is adjusted as provided by administrative rules set out in WAC 458-57.[23]

The separate Washington QTIP election is not relevant in the present case because the Barbara Nelson Estate did not make a federal QTIP election under IRC § 2056 and was required to file a federal estate tax return. As a result, the condition precedent in RCW 83.100.047(1) was not met, and the separate Washington QTIP authorized under that statute is not applicable.

2. The Estate has misconstrued WAC 458-57-105(3)(q) and -115(2)(d).

Because the separate Washington QTIP is not applicable under the facts of this case, the administrative rules the Department issued in 2006

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[22] RCW 83.100.047(1) sets out a conditional "if – then" statement. If the decedent's federal taxable estate is determined by making a QTIP election under IRC § 2056, or if no federal return is required to be filed, then a separate Washington QTIP election may be made as provided by administrative rule.

[23] The purpose for allowing a separate state QTIP election is to provide added flexibility in crafting an estate plan that takes advantage of all available deductions and deferrals. *See* Steven D. Nofziger, Comment, *EGTRRA and the Past, Present, and Future of Oregon's Inheritance Tax System*, 84 OR. L. REV. 317, 344-45 (2005) (explaining how the separate Oregon QTIP election allows Oregon taxpayers to take full advantage of both a credit shelter trust and a QTIP trust as estate tax planning tools). This added flexibility allows "[a] personal representative [to] make a larger or smaller percentage or fractional QTIP election on the Washington return than taken on the federal return in order to reduce Washington estate liability while making full use of the federal unified credit." WAC 458-57-115(2)(c)(iii)(A).

to implement the Washington QTIP election are also not applicable. Moreover, even assuming *arguendo* that those rules were applicable, the Estate has misconstrued the rules in an effort to claim a tax deduction that is simply not authorized.

Both WAC 458-57-105(3)(q)(vi) and -115(2)(d)(vi) are subparts of broader administrative rules designed to explain how to compute the Washington taxable estate when a separate Washington QTIP has been elected. The separate Washington QTIP affects both the estate of the decedent who made the election (the first spouse to die) and the estate of the surviving spouse (the second spouse to die). Under these rules, the estate of a first spouse to die that makes a federal QTIP election and a separate Washington QTIP election must replace the federal QTIP amount with the Washington QTIP amount. Likewise, the estate of the second spouse to die must replace the QTIP included in its federal taxable estate under IRC § 2044 with the Washington QTIP.

WAC 458-57-105(3)(q)(iii) and (iv) set out the adjustment necessary to correctly compute the Washington taxable estate of the first spouse to die who makes a separate Washington QTIP election.

> (q) "Washington taxable estate" means the "federal taxable estate" . . . (iii) Less the amount of Washington qualified terminable interest property (QTIP) election made under RCW 83.100.047; (iv) Plus any amount deducted from the federal estate pursuant to IRC § 2056(b)(7) (the federal QTIP election).

See also WAC 458-57-115(2)(d)(iii) and (iv). By replacing the federal QTIP amount with the Washington QTIP amount, the Washington taxable estate is determined consistent with RCW 83.100.047(1) and with the underlying purpose for allowing a state specific QTIP election.

WAC 458-57-105(3)(q)(v) and (vi) set out the adjustment necessary to correctly compute the Washington taxable estate of the second spouse to die where the predeceased spouse made a separate Washington QTIP election.

> (q) "Washington taxable estate" means the "federal taxable estate" . . . (v) Plus the value of any trust (or portion of a trust) of which the decedent was income beneficiary and for which a Washington QTIP election was previously made pursuant to RCW 83.100.047; and (vi) Less any amount included in the federal taxable estate pursuant to IRC § 2044 (inclusion of amounts for which a federal QTIP election was previously made).

See also WAC 458-57-115(2)(d)(v) and (vi). By replacing the federal section 2044 property with the corresponding Washington QTIP amount, the Washington taxable estate is determined consistent with RCW 83.100.047(1) and with the underlying purpose for allowing a state specific QTIP election.

The adjustment required by the estate of the second spouse to die when the predeceased spouse has made a Washington QTIP election under RCW 83.100.047(1) is further explained in WAC 458-57-115(2)(c)(iii)(B). That administrative rule provides that

> a surviving spouse who receives property for which a Washington QTIP election was made must include the value of the remaining property in his or her gross estate for Washington estate tax purposes. <u>If the value of property for which a federal QTIP election was made is different, this value is not includible in the surviving spouse's gross estate for Washington estate tax purposes; instead, the value of property for which a Washington QTIP election was made is includible</u>.

(Emphasis added). In other words, if the value of federal QTIP is different from the value of the Washington QTIP, the federal QTIP is subtracted and the Washington QTIP is added. By making this adjustment, the estate of the second spouse is taxable on the Washington QTIP that was elected when the first spouse died.

When read in context, WAC 458-57-105(3)(q) and -115(2)(d) explain the adjustments required in computing the Washington taxable estate when a separate Washington QTIP has been elected. Subparts (iii) and (iv) of each rule explain the adjustments required for the estate of the first spouse that made the separate Washington QTIP election, and subparts (v) and (vi) of each rule explain the adjustments required for the estate of the second spouse that is subject to estate tax on the Washington QTIP. By contrast, reading these subparts independently, as suggested by the Estate, results in a deduction that is not authorized by statute, that is inconsistent with the purpose of a state specific QTIP election, and that is contrary to the more specific rule set out in WAC 458-57-115(2)(c)(iii)(B).

3. WAC 458-57-105(3)(q) and -115(2)(d) do not replace or supersede RCW 83.100.020(13).

The administrative rules the Estate relies on do not replace or supersede the statutory definition of "Washington taxable estate" set out in RCW 83.100.020(13). That statutory definition provides that for decedents dying on or after January 1, 2006, the term "Washington taxable estate" means "the federal taxable estate" less $2,000,000 and less the farm property deduction set out in RCW 83.100.046. There is no deduction for QTIP included in the federal taxable estate under IRC § 2044. Had the Washington Legislature intended QTIP included in the federal taxable estate to be deducted in computing the Washington taxable estate, it would have specifically authorized the deduction. *Belas v. Kiga*, 135 Wn.2d 913, 934-35, 959 P.2d 1037 (1998) (tax exemptions and tax deductions are a matter of legislative grace and "may not be created by implication.").

Administrative rules must be consistent with the statute they implement or interpret. *Tesoro Ref. & Mktg. Co. v. Dep't. of Revenue*, 164 Wn.2d 310, 324, 190 P.3d 28 (2008) (regulations that are inconsistent with the statute are void); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007) ("rules that are inconsistent with the statutes they implement are invalid."); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 439-40, 120 P.3d 46 (2005) ("Legislative rules must be consistent with the statutes [the agency] is charged with administering."). In addition, the Department of Revenue cannot use its administrative rules to expand tax immunity beyond the exemptions or deductions provided by statute. *Coast Pacific Trading, Inc. v. Dep't of Revenue*, 105 Wn.2d 912, 917, 719 P.2d 541 (1986). As a result, the Estate's argument that WAC 458-57-105(3)(q)(vi) and WAC 458-57-115(2)(d)(vi) authorize a deduction of section 2044 property even when no separate Washington QTIP has been elected must fail because it is not supported by any statutory authority.

4. The Department's interpretation of WAC 458-57-105(3)(q) and -115(2)(d) is supported by the rule-making file and well-established rules of construction.

As discussed above, there is no statutory support for the Estate's position that section 2044 property can be deducted under the facts of this case. Because the statute is clear and unambiguous, there is no need to consult extrinsic sources or to apply rules of construction.

In addition, even if extrinsic sources were consulted, there is no evidence in the Department's rule-making file to support the Estate's proposed interpretation of WAC 458-57-105(3)(q) and -115(2)(d). *See* CP 335-341, CP 878-1001 (relevant portions of 2006 rule-making file). Rather, it is undisputed that the Department has consistently disagreed with the interpretation of its rules that is being advanced by the Estate in this case. *See, e.g.*, CP 339 ("Concise Explanatory Statement" addressing written comments made by Mr. Benjamin G. Porter.). There is simply no merit to the Estate's assertion that the Department intended WAC 458-57-105(3)(q)(vi) and -115(2)(d)(vi) to be read in isolation. Rather, the undisputed evidence shows that the Department always intended those subsections to be read in context with the Washington QTIP election allowed under RCW 83.100.047(1) and in context with the rules as a whole. *See, e.g.*, CP 600 (letter from Department explaining how WAC 458-57-105(3)(q)(v) and (vi) "are tied together; you only get to deduct the latter if you've included the former."). More importantly, the record shows that the Department never intended to create a deduction for section 2044 property that would apply when no Washington QTIP election had been made by the predeceased spouse. CP 566 (deposition testimony of Judy Wells at 83:2 to 83:20), CP 746 (deposition testimony of Cindy Evans at 32:19 to 32:22).

The Department's interpretation of its own administrative rules should be given deference. *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007) (a court "will give great deference to an agency's interpretation of its own properly promulgated regulations, absent a compelling indication that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority.) (Internal quotations and citation omitted). This is particularly true when the Department's interpretation is supported by direct evidence contained in the rule-making file and by undisputed testimony from the very agency employees that drafted the rule.

Furthermore, if any doubt remains as to the Department's intent, other rules of construction support the Department, not the Estate. For example, an administrative rule must be construed "in context and not in isolation" from the law it is interpreting or implementing. *Tesoro Ref. & Mktg. Co. v. Dep't. of Revenue*, 164 Wn.2d 310, 323, 190 P.3d 28 (2008). The stated purpose for the 2005 legislation that amended the Washington estate tax was to make up for "the revenue loss resulting from the *Estate of Hemphill* decision" by creating a stand-alone estate tax to fund the education legacy trust account. Laws of 2005, ch. 516, §§ 1, 16. There is no evidence that the Washington Legislature intended to create—or authorize the Department to create—a tax deduction for section 2044 property when no separate Washington QTIP election had been made by the predeceased spouse. *See generally*, 2005 Final Legislative Report, p. 358-59 (discussing 2005 amendments to estate tax).[24] Thus, when read in context with the purpose of the 2005 amendments to the estate tax, the Department's interpretation of WAC 458-57-105(3)(q) and -115(2)(d) is consistent with the Legislature's intent.

In the final analysis, the Estate is advancing an interpretation of WAC 458-57-105(3)(q) and WAC 458-57-115(2)(d) that is inconsistent with the law as enacted by the Washington Legislature, inconsistent with the Department's interpretation of the rules it drafted and approved through the APA rule-making process, and inconsistent with well-established rules of construction. As a result, the Estate's proposed interpretation lacks merit and should be rejected. The 2006 amendments to the estate tax rules do not allow the QTIP deduction the Estate is claiming.

V. CONCLUSION

Although this case may appear complex, it turns on plain and unambiguous statutory language. The Washington Legislature, in RCW 83.100.020(13) and (14), has statutorily defined "Washington taxable estate" and "federal taxable estate." As defined, QTIP included in the federal taxable estate of a decedent under IRC § 2044 is also included in that decedent's Washington taxable estate. By deducting the QTIP on its Washington return, the Estate is simply claiming a deduction that is not

[24] A copy of the relevant pages from the 2005 Final Legislative Report is in the record at CP 1064-1066.

found anywhere in state or federal law. Because the Estate is claiming a deduction that does not exist, the Department correctly denied the deduction as a matter of law. Consequently, the Court should affirm the trial court's order granting the Department of Revenue's motion for summary judgment.

RESPECTFULLY SUBMITTED this 7th day of July, 2010.

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APPENDIX A

Subsec. (c)(2)(B). Pub. L. 91–172, § 401(d)(2), substituted "5 or fewer persons who are individuals, estates, or trusts (referred to in this subparagraph as 'common owners') own" for "a person who is an individual, estate, or trust (referred to in this paragraph as 'common owner') owns" and in cl. (ii), substituted "any of such common owners", "any of the common owners" for "such common owner" and "the common owner", respectively and added cl. (iii).

EFFECTIVE DATE OF 2004 AMENDMENT

Pub. L. 108–357, title VIII, §900(c), Oct. 22, 2004, 118 Stat. 1650, provided that: "The amendments made by this section [amending this section] shall apply to taxable years beginning after the date of the enactment of this Act [Oct. 22, 2004]."

EFFECTIVE DATE OF 1988 AMENDMENT

Section 1018(s)(3)(B) of Pub. L. 100–647 provided that: "The amendment made by subparagraph (A) [amending this section] shall apply to taxable years beginning after the date of the enactment of this Act [Nov. 10, 1988]."

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–514 applicable to taxable years beginning after Dec. 31, 1986, see section 1024(e) of Pub. L. 99–514, set out as a note under section 831 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–369 applicable to taxable years beginning after Dec. 31, 1983, see section 215 of Pub. L. 98–369, set out as an Effective Date note under section 801 of this title.

EFFECTIVE DATE OF 1969 AMENDMENT

Amendment by Pub. L. 91–172 applicable with respect to taxable years ending on or after Dec. 31, 1970, see section 401(h)(3) of Pub. L. 91–172, set out as a note under section 1561 of this title.

EFFECTIVE DATE

Section applicable with respect to taxable years ending after Dec. 31, 1963, see section 235(d) of Pub. L. 88–272, set out as an Effective Date of 1964 Amendment note under section 1551 of this title.

[§ 1564. Repealed. Pub. L. 101–508, title XI, § 11801(a)(38), Nov. 5, 1990, 104 Stat. 1388–521]

Section, added Pub. L. 91–172, title IV, § 401(b)(1), Dec. 30, 1969, 83 Stat. 600; amended Pub. L. 94–455, title XIX, §§ 1901(b)(1)(J)(vi), (21)(A)(ii), 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1791, 1797, 1834, related to transitional rules in the case of certain controlled corporations.

SAVINGS PROVISION

For provisions that nothing in repeal by Pub. L. 101-508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101–508, set out as a note under section 45K of this title.

Subtitle B—Estate and Gift Taxes

[1] Section numbers editorially supplied.

AMENDMENTS

1990—Pub. L. 101–508, title XI, § 11602(c), Nov. 5, 1990, 104 Stat. 1388–500, added item for chapter 14.

1986—Pub. L. 99–514, title XIV, § 1431(b), Oct. 22, 1986, 100 Stat. 2729, struck out "certain" after "Tax on" in item for chapter 13.

1976—Pub. L. 94–455, title XX, § 2006(b)(1), Oct. 4, 1976, 90 Stat. 1888, added item for chapter 13.

CHAPTER 11—ESTATE TAX

Subchapter A—Estates of Citizens or Residents

PART I—TAX IMPOSED

AMENDMENTS

1976—Pub. L. 94–455, title XX, § 2001(c)(1)(N)(i), Oct. 4, 1976, 90 Stat. 1853, substituted "Imposition and rate of tax" for "Rate of tax" in item 2001.

§ 2001. Imposition and rate of tax

(a) Imposition

A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

(b) Computation of tax

The tax imposed by this section shall be the amount equal to the excess (if any) of—

(1) a tentative tax computed under subsection (c) on the sum of—

(A) the amount of the taxable estate, and

(B) the amount of the adjusted taxable gifts, over

(2) the aggregate amount of tax which would have been payable under chapter 12 with respect to gifts made by the decedent after December 31, 1976, if the provisions of subsection (c) (as in effect at the decedent's death) had been applicable at the time of such gifts.

For purposes of paragraph (1)(B), the term "adjusted taxable gifts" means the total amount of the taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts which are includible in the gross estate of the decedent.

(c) Rate schedule

(1) In general

If the amount with respect to which the tentative tax to be computed is:	The tentative tax is:
Not over $10,000	18 percent of such amount.
Over $10,000 but not over $20,000.	$1,800, plus 20 percent of the excess of such amount over $10,000.

[1] Section numbers editorially supplied.

If the amount with respect to which the tentative tax to be computed is:	The tentative tax is:
Over $20,000 but not over $40,000.	$3,800, plus 22 percent of the excess of such amount over $20,000.
Over $40,000 but not over $60,000.	$8,200 plus 24 percent of the excess of such amount over $40,000.
Over $60,000 but not over $80,000.	$13,000, plus 26 percent of the excess of such amount over $60,000.
Over $80,000 but not over $100,000.	$18,200, plus 28 percent of the excess of such amount over $80,000.
Over $100,000 but not over $150,000.	$23,800, plus 30 percent of the excess of such amount over $100,000.
Over $150,000 but not over $250,000.	$38,800, plus 32 percent of the excess of such amount over $150,000.
Over $250,000 but not over $500,000.	$70,800, plus 34 percent of the excess of such amount over $250,000.
Over $500,000 but not over $750,000.	$155,800, plus 37 percent of the excess of such amount over $500,000.
Over $750,000 but not over $1,000,000.	$248,300, plus 39 percent of the excess of such amount over $750,000.
Over $1,000,000 but not over $1,250,000.	$345,800, plus 41 percent of the excess of such amount over $1,000,000.
Over $1,250,000 but not over $1,500,000.	$448,300, plus 43 percent of the excess of such amount over $1,250,000.
Over $1,500,000 but not over $2,000,000.	$555,800, plus 45 percent of the excess of such amount over $1,500,000.
Over $2,000,000 but not over $2,500,000.	$780,800, plus 49 percent of the excess of such amount over $2,000,000.
Over $2,500,000	$1,025,800, plus 50% of the excess over $2,500,000.

(2) Phasedown of maximum rate of tax

(A) In general

In the case of estates of decedents dying, and gifts made, in calendar years after 2002 and before 2010, the tentative tax under this subsection shall be determined by using a table prescribed by the Secretary (in lieu of using the table contained in paragraph (1)) which is the same as such table; except that—

(i) the maximum rate of tax for any calendar year shall be determined in the table under subparagraph (B), and

(ii) the brackets and the amounts setting forth the tax shall be adjusted to the extent necessary to reflect the adjustments under subparagraph (A).

(B) Maximum rate

In calendar year:	The maximum rate is:
2003	49 percent
2004	48 percent
2005	47 percent
2006	46 percent
2007, 2008, and 2009	45 percent.

(d) Adjustment for gift tax paid by spouse

For purposes of subsection (b)(2), if—

(1) the decedent was the donor of any gift one-half of which was considered under section 2513 as made by the decedent's spouse, and

(2) the amount of such gift is includible in the gross estate of the decedent,

any tax payable by the spouse under chapter 12 on such gift (as determined under section 2012(d)) shall be treated as a tax payable with respect to a gift made by the decedent.

(e) Coordination of sections 2513 and 2035

If—

(1) the decedent's spouse was the donor of any gift one-half of which was considered under section 2513 as made by the decedent, and

(2) the amount of such gift is includible in the gross estate of the decedent's spouse by reason of section 2035,

such gift shall not be included in the adjusted taxable gifts of the decedent for purposes of subsection (b)(1)(B), and the aggregate amount determined under subsection (b)(2) shall be reduced by the amount (if any) determined under subsection (d) which was treated as a tax payable by the decedent's spouse with respect to such gift.

(f) Valuation of gifts

(1) In general

If the time has expired under section 6501 within which a tax may be assessed under chapter 12 (or under corresponding provisions of prior laws) on—

(A) the transfer of property by gift made during a preceding calendar period (as defined in section 2502(b)); or

(B) an increase in taxable gifts required under section 2701(d),

the value thereof shall, for purposes of computing the tax under this chapter, be the value as finally determined for purposes of chapter 12.

(2) Final determination

For purposes of paragraph (1), a value shall be treated as finally determined for purposes of chapter 12 if—

(A) the value is shown on a return under such chapter and such value is not contested by the Secretary before the expiration of the time referred to in paragraph (1) with respect to such return;

(B) in a case not described in subparagraph (A), the value is specified by the Secretary and such value is not timely contested by the taxpayer; or

(C) the value is determined by a court or pursuant to a settlement agreement with the Secretary.

For purposes of subparagraph (A), the value of an item shall be treated as shown on a return if the item is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

(Aug. 16, 1954, ch. 736, 68A Stat. 373; Pub. L. 94–455, title XX, § 2001(a)(1), Oct. 4, 1976, 90 Stat. 1846; Pub. L. 95–600, title VII, § 702(h)(1), Nov. 6, section 501(f) of Pub. L. 105–34, set out as a note under section 2001 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Section 401(c)(1) of Pub. L. 97–34 provided that: "The amendments made by subsection (a) [amending this section and section 6018 of this title] shall apply to the estates of decedents dying after December 31, 1981".

SAVINGS PROVISION

For provisions that nothing in amendment by Pub. L. 101–508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101–508, set out as a note under section 45K of this title.

§ 2011. Credit for State death taxes

(a) In general

The tax imposed by section 2001 shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent).

(b) Amount of credit

(1) In general

Except as provided in paragraph (2), the credit allowed by this section shall not exceed the appropriate amount stated in the following table:

If the adjusted taxable estate is:	The maximum tax credit shall be:
Not over $90,000	8/10ths of 1% of the amount by which the adjusted taxable estate exceeds $40,000.
Over $90,000 but not over $140,000.	$400 plus 1.6% of the excess over $90,000.
Over $140,000 but not over $240,000.	$1,200 plus 2.4% of the excess over $140,000.
Over $240,000 but not over $440,000.	$3,600 plus 3.2% of the excess over $240,000.
Over $440,000 but not over $640,000.	$10,000 plus 4% of the excess over $440,000.
Over $640,000 but not over $840,000.	$18,000 plus 4.8% of the excess over $640,000.
Over $840,000 but not over $1,040,000.	$27,600 plus 5.6% of the excess over $840,000.
Over $1,040,000 but not over $1,540,000.	$38,800 plus 6.4% of the excess over $1,040,000.
Over $1,540,000 but not over $2,040,000.	$70,800 plus 7.2% of the excess over $1,540,000.
Over $2,040,000 but not over $2,540,000.	$106,800 plus 8% of the excess over $2,040,000.
Over $2,540,000 but not over $3,040,000.	$146,800 plus 8.8% of the excess over $2,540,000
Over $3,040,000 but not over $3,540,000.	$190,800 plus 9.6% of the excess over $3,040,000.
Over $3,540,000 but not over $4,040,000.	$238,800 plus 10.4% of the excess over $3,540,000.
Over $4,040,000 but not over $5,040,000.	$290,800 plus 11.2% of the excess over $4,040,000.
Over $5,040,000 but not over $6,040,000.	$402,800 plus 12% of the excess over $5,040,000.
Over $6,040,000 but not over $7,040,000.	$522,800 plus 12.8% of the excess over $6,040,000.
Over $7,040,000 but not over $8,040,000.	$650,800 plus 13.6% of the excess over $7,040,000.
Over $8,040,000 but not over $9,040,000.	$786,800 plus 14.4% of the excess over $8,040,000.
Over $9,040,000 but not over $10,040,000.	$930,800 plus 15.2% of the excess over $9,040,000.
Over $10,040,000	$1,082,800 plus 16% of the excess over $10,040,000.

(2) Reduction of maximum credit

(A) In general

In the case of estates of decedents dying after December 31, 2001, the credit allowed by this section shall not exceed the applicable percentage of the credit otherwise determined under paragraph (1).

(B) Applicable percentage

In the case of estates of decedents dying during:	The applicable percentage is:
2002	75 percent
2003	50 percent
2004	25 percent.

(3) Adjusted taxable estate

For purposes of this section, the term "adjusted taxable estate" means the taxable estate reduced by $60,000.

(c) Period of limitations on credit

The credit allowed by this section shall include only such taxes as were actually paid and credit therefor claimed within 4 years after the filing of the return required by section 6018, except that—

(1) If a petition for redetermination of a deficiency has been filed with the Tax Court within the time prescribed in section 6213(a), then within such 4-year period or before the expiration of 60 days after the decision of the Tax Court becomes final.

(2) If, under section 6161 or 6166, an extension of time has been granted for payment of the tax shown on the return, or of a deficiency, then within such 4-year period or before the date of the expiration of the period of the extension.

(3) If a claim for refund or credit of an overpayment of tax imposed by this chapter has been filed within the time prescribed in section 6511, then within such 4-year period or before the expiration of 60 days from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of any part of such claim, or before the expiration of 60 days after a decision by any court of competent jurisdiction becomes final with respect to a timely suit instituted upon such claim, whichever is later.

Refund based on the credit may (despite the provisions of sections 6511 and 6512) be made if claim therefor is filed within the period above provided. Any such refund shall be made without interest.

(d) Limitation in cases involving deduction under section 2053(d)

In any case where a deduction is allowed under section 2053(d) for an estate, succession, legacy, or inheritance tax imposed by a State or the District of Columbia upon a transfer for public, charitable, or religious uses described in section 2055 or 2106(a)(2), the allowance of the credit under this section shall be subject to the following conditions and limitations:

(1) The taxes described in subsection (a) shall not include any estate, succession, leg-

acy, or inheritance tax for which such deduction is allowed under section 2053(d).

(2) The credit shall not exceed the lesser of—

(A) the amount stated in subsection (b) on an adjusted taxable estate determined by allowing such deduction authorized by section 2053(d), or

(B) that proportion of the amount stated in subsection (b) on an adjusted taxable estate determined without regard to such deduction authorized by section 2053(d) as (i) the amount of the taxes described in subsection (a), as limited by the provisions of paragraph (1) of this subsection, bears to (ii) the amount of the taxes described in subsection (a) before applying the limitation contained in paragraph (1) of this subsection.

(3) If the amount determined under subparagraph (B) of paragraph (2) is less than the amount determined under subparagraph (A) of that paragraph, then for purposes of subsection (d) such lesser amount shall be the maximum credit provided by subsection (b).

(e) Limitation based on amount of tax

The credit provided by this section shall not exceed the amount of the tax imposed by section 2001, reduced by the amount of the unified credit provided by section 2010.

(f) Termination

This section shall not apply to the estates of decedents dying after December 31, 2004.

(Aug. 16, 1954, ch. 736, 68A Stat. 374; Feb. 20, 1956, ch. 63, §3, 70 Stat. 24; Pub. L. 85–866, title I, §§65(a), 102(c)(1), Sept. 2, 1958, 72 Stat. 1657, 1674; Pub. L. 86–175, §3, Aug. 21, 1959, 73 Stat. 397; Pub. L. 94–455, title XIX, §§1902(a)(12)(B), 1906(b)(13)(A), title XX, §§2001(c)(1)(A), 2004(f)(3), Oct. 4, 1976, 90 Stat. 1806, 1834, 1849, 1872; Pub. L. 97–34, title IV, §422(e)(2), Aug. 13, 1981, 95 Stat. 316; Pub. L. 107–16, title V, §§531(a), 532(a), June 7, 2001, 115 Stat. 72, 73; Pub. L. 107–134, title I, §103(b)(1), Jan. 23, 2002, 115 Stat. 2431.)

AMENDMENT OF SECTION

For termination of amendment by section 901 of Pub. L. 107–16, see Effective and Termination Dates of 2001 Amendment note below.

AMENDMENTS

2002—Subsecs. (d) to (g). Pub. L. 107–134 redesignated subsecs. (e) to (g) as (d) to (f), respectively, and struck out heading and text of former subsec. (d). Text read as follows: "The basic estate tax and the estate tax imposed by the Revenue Act of 1926 shall be 125 percent of the amount determined to be the maximum credit provided by subsection (b). The additional estate tax shall be the difference between the tax imposed by section 2001 or 2101 and the basic estate tax."

2001—Subsec. (b). Pub. L. 107–16, §§531(a), 901, temporarily designated existing provisions as pars. (1) and (3), inserted headings, in par. (1) substituted "Except as provided in paragraph (2), the credit allowed" for "The credit allowed", and added par. (2). See Effective and Termination Dates of 2001 Amendment note below.

Subsec. (g). Pub. L. 107–16, §§532(a), 901, temporarily added subsec. (g). See Effective and Termination Dates of 2001 Amendment note below.

1981—Subsec. (c)(2). Pub. L. 97–34 struck out reference to section 6166A.

1976—Subsec. (a). Pub. L. 94–455, §1902(a)(12)(B), struck out "or Territory" after "State".

Subsec. (b). Pub. L. 94–455, §2001(c)(1)(A)(i), (ii), substituted "adjusted taxable estate" for "taxable estate" in two places in table and inserted provision that, for purposes of this section, "adjusted taxable estate" means the taxable estate reduced by $60,000.

Subsec. (c)(2). Pub. L. 94–455, §2004(f)(3), substituted "section 6161, 6166, or 6166A" for "section 6161".

Subsec. (c)(3). Pub. L. 94–455, §1906(b)(13)(A), struck out "or his delegate" after "Secretary".

Subsec. (e). Pub. L. 94–455, §§1902(a)(12)(B), 2001(c)(1)(A)(iii), substituted "adjusted taxable estate" for "taxable estate" in par. (2) and struck out "or Territory" after "imposed by a State" in provisions preceding par. (1).

Subsec. (f). Pub. L. 94–455, §2001(c)(1)(A)(iv), added subsec. (f).

1959—Subsec. (e). Pub. L. 86–175 substituted "imposed by a State or Territory or the District of Columbia upon a transfer" for "imposed upon a transfer" in introduction, "such deduction" for "a deduction" in par. (1) and "such deduction" for "the deduction" in two places in par. (2).

1958—Subsec. (a). Pub. L. 85–866, §102(c)(1), struck out "or any possession of the United States," after "District of Columbia,".

Subsec. (c)(3). Pub. L. 85–866, §65(a), added par. (3).

1956—Subsec. (e). Act Feb. 20, 1956, added subsec. (e).

EFFECTIVE DATE OF 2002 AMENDMENT

Pub. L. 107–134, title I, §103(d), Jan. 23, 2002, 115 Stat. 2431, provided that:

"(1) EFFECTIVE DATE.—The amendments made by this section [amending this section and sections 2053 and 2201 of this title] shall apply to estates of decedents—

"(A) dying on or after September 11, 2001; and

"(B) in the case of individuals dying as a result of the April 19, 1995, terrorist attack, dying on or after April 19, 1995.

"(2) WAIVER OF LIMITATIONS.—If refund or credit of any overpayment of tax resulting from the amendments made by this section is prevented at any time before the close of the 1-year period beginning on the date of the enactment of this Act [Jan. 23, 2002] by the operation of any law or rule of law (including res judicata), such refund or credit may nevertheless be made or allowed if claim therefor is filed before the close of such period."

EFFECTIVE AND TERMINATION DATES OF 2001 AMENDMENT

Pub. L. 107–16, title V, §531(b), June 7, 2001, 115 Stat. 73, as amended by Pub. L. 108–311, title IV, §408(b)(6), Oct. 4, 2004, 118 Stat. 1192, provided that: "The amendments made by this section [amending this section] shall apply to estates of decedents dying after December 31, 2001."

Pub. L. 107–16, title V, §532(d), June 7, 2001, 115 Stat. 75, provided that: "The amendments made by this section [enacting section 2058 of this title and amending this section and sections 2012 to 2016, 2053, 2056A, 2102, 2106, 2107, 2201, 2604, 6511, and 6612 of this title] shall apply to estates of decedents dying, and generation-skipping transfers, after December 31, 2004."

Amendment by Pub. L. 107–16 inapplicable to estates of decedents dying, gifts made, or generation skipping transfers, after Dec. 31, 2010, and the Internal Revenue Code of 1986 to be applied and administered to such estates, gifts, and transfers as if such amendment had never been enacted, see section 901 of Pub. L. 107–16, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97–34 applicable to estates of decedents dying after Dec. 31, 1981, see section 422(f)(1) of Pub. L. 97–34, set out as a note under section 6166 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 1902(c)(1) of Pub. L. 94–455, as amended by Pub. L. 95–600, title VII, §703(j)(12), Nov. 6, 1978, 92 Stat.

manner as may be required by regulations prescribed by him, and the Secretary shall (despite the provisions of section 6501) redetermine the amount of the tax under this chapter and the amount, if any, of the tax due on such redetermination, shall be paid by the executor or such person or persons, as the case may be, on notice and demand. No interest shall be assessed or collected on any amount of tax due on any redetermination by the Secretary resulting from a refund to the executor of tax claimed as a credit under section 2014, for any period before the receipt of such refund, except to the extent interest was paid by the foreign country on such refund.

(Aug. 16, 1954, ch. 736, 68A Stat. 380; Pub. L. 94–455, title XIX, §§ 1902(a)(12)(C), 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1806, 1834; Pub. L. 107–16, title V, § 532(c)(4), June 7, 2001, 115 Stat. 74; Pub. L. 107–147, title IV, § 411(h), Mar. 9, 2002, 116 Stat. 46.)

AMENDMENT OF SECTION

For termination of amendment by section 901 of Pub. L. 107–16, see Effective and Termination Dates of 2001 Amendment note below.

AMENDMENTS

2002—Pub. L. 107–147 struck out "any State, any possession of the United States, or the District of Columbia," after "any foreign country,".

2001—Pub. L. 107–16, §§ 532(c)(4), 901, temporarily struck out "2011 or" before "2014 is recovered". See Effective and Termination Dates of 2001 Amendment note below.

1976—Pub. L. 94–455 struck out "Territory or" after "any State, any" and "or his delegate" after "Secretary".

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–147 effective as if included in the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, to which such amendment relates, see section 411(x) of Pub. L. 107–147, set out as a note under section 25B of this title.

EFFECTIVE AND TERMINATION DATES OF 2001 AMENDMENT

Amendment by Pub. L. 107–16 applicable to estates of decedents dying, and generation-skipping transfers, after Dec. 31, 2004, see section 532(d) of Pub. L. 107–16, set out as a note under section 2011 of this title.

Amendment by Pub. L. 107–16 inapplicable to estates of decedents dying, gifts made, or generation skipping transfers, after Dec. 31, 2010, and the Internal Revenue Code of 1986 to be applied and administered to such estates, gifts, and transfers as if such amendment had never been enacted, see section 901 of Pub. L. 107–16, set out as a note under section 1 of this title.

PART III—GROSS ESTATE

AMENDMENTS

1998—Pub. L. 105–206, title VI, § 6007(b)(1)(E), July 22, 1998, 112 Stat. 808, struck out item 2033A "Family-owned business exclusion".

1997—Pub. L. 105–34, title V, § 502(b), title XIII, § 1310(b), Aug. 5, 1997, 111 Stat. 852, 1044, added item 2033A and substituted "certain gifts" for "gifts" in item 2035.

1981—Pub. L. 97–34, title IV, § 403(d)(3)(A)(ii), Aug. 13, 1981, 95 Stat. 304, added item 2044 and redesignated former items 2044 and 2045 as items 2045 and 2046, respectively.

1976—Pub. L. 94–455, title XX, §§ 2001(c)(1)(N)(iii), 2003(d)(1), 2009(b)(3)(B), Oct. 4, 1976, 90 Stat. 1853, 1862, 1894, added items 2032A and 2045 and substituted "Adjustments for gifts made within 3 years of decedent's death" for "Transactions in contemplation of death" in item 2035.

§ 2031. Definition of gross estate

(a) General

The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

(b) Valuation of unlisted stock and securities

In the case of stock and securities of a corporation the value of which, by reason of their not being listed on an exchange and by reason of the absence of sales thereof, cannot be determined with reference to bid and asked prices or with reference to sales prices, the value thereof shall be determined by taking into consideration, in addition to all other factors, the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange.

(c) Estate tax with respect to land subject to a qualified conservation easement

(1) In general

If the executor makes the election described in paragraph (6), then, except as otherwise provided in this subsection, there shall be excluded from the gross estate the lesser of—

(A) the applicable percentage of the value of land subject to a qualified conservation easement, reduced by the amount of any deduction under section 2055(f) with respect to such land, or

(B) the exclusion limitation.

(2) Applicable percentage

For purposes of paragraph (1), the term "applicable percentage" means 40 percent reduced (but not below zero) by 2 percentage points for each percentage point (or fraction thereof) by which the value of the qualified conservation easement is less than 30 percent of the value of the land [1](determined without regard to the

[1] So in original. No closing parenthesis was enacted.

value of such easement and reduced by the value of any retained development right (as defined in paragraph (5)). The values taken into account under the preceding sentence shall be such values as of the date of the contribution referred to in paragraph (8)(B).

(3) Exclusion limitation

For purposes of paragraph (1), the exclusion limitation is the limitation determined in accordance with the following table:

In the case of estates of decedents dying during:	The exclusion limitation is:
1998	$100,000
1999	$200,000
2000	$300,000
2001	$400,000
2002 or thereafter	$500,000.

(4) Treatment of certain indebtedness

(A) In general

The exclusion provided in paragraph (1) shall not apply to the extent that the land is debt-financed property.

(B) Definitions

For purposes of this paragraph—

(i) Debt-financed property

The term "debt-financed property" means any property with respect to which there is an acquisition indebtedness (as defined in clause (ii)) on the date of the decedent's death.

(ii) Acquisition indebtedness

The term "acquisition indebtedness" means, with respect to debt-financed property, the unpaid amount of—

(I) the indebtedness incurred by the donor in acquiring such property,

(II) the indebtedness incurred before the acquisition of such property if such indebtedness would not have been incurred but for such acquisition,

(III) the indebtedness incurred after the acquisition of such property if such indebtedness would not have been incurred but for such acquisition and the incurrence of such indebtedness was reasonably foreseeable at the time of such acquisition, and

(IV) the extension, renewal, or refinancing of an acquisition indebtedness.

(5) Treatment of retained development right

(A) In general

Paragraph (1) shall not apply to the value of any development right retained by the donor in the conveyance of a qualified conservation easement.

(B) Termination of retained development right

If every person in being who has an interest (whether or not in possession) in the land executes an agreement to extinguish permanently some or all of any development rights (as defined in subparagraph (D)) retained by the donor on or before the date for filing the return of the tax imposed by section 2001, then any tax imposed by section 2001 shall be reduced accordingly. Such agreement shall be filed with the return of the tax imposed by section 2001. The agreement shall be in such form as the Secretary shall prescribe.

(C) Additional tax

Any failure to implement the agreement described in subparagraph (B) not later than the earlier of—

(i) the date which is 2 years after the date of the decedent's death, or

(ii) the date of the sale of such land subject to the qualified conservation easement,

shall result in the imposition of an additional tax in the amount of the tax which would have been due on the retained development rights subject to such agreement. Such additional tax shall be due and payable on the last day of the 6th month following such date.

(D) Development right defined

For purposes of this paragraph, the term "development right" means any right to use the land subject to the qualified conservation easement in which such right is retained for any commercial purpose which is not subordinate to and directly supportive of the use of such land as a farm for farming purposes (within the meaning of section 2032A(e)(5)).

(6) Election

The election under this subsection shall be made on or before the due date (including extensions) for filing the return of tax imposed by section 2001 and shall be made on such return. Such an election, once made, shall be irrevocable.

(7) Calculation of estate tax due

An executor making the election described in paragraph (6) shall, for purposes of calculating the amount of tax imposed by section 2001, include the value of any development right (as defined in paragraph (5)) retained by the donor in the conveyance of such qualified conservation easement. The computation of tax on any retained development right prescribed in this paragraph shall be done in such manner and on such forms as the Secretary shall prescribe.

(8) Definitions

For purposes of this subsection—

(A) Land subject to a qualified conservation easement

The term "land subject to a qualified conservation easement" means land—

(i) which is located in the United States or any possession of the United States,

(ii) which was owned by the decedent or a member of the decedent's family at all times during the 3-year period ending on the date of the decedent's death, and

(iii) with respect to which a qualified conservation easement has been made by an individual described in subparagraph (C), as of the date of the election described in paragraph (6).

(B) Qualified conservation easement

The term "qualified conservation easement" means a qualified conservation contribution (as defined in section 170(h)(1)) of a qualified real property interest (as defined in section 170(h)(2)(C)), except that clause (iv) of section 170(h)(4)(A) shall not apply, and the restriction on the use of such interest described in section 170(h)(2)(C) shall include a prohibition on more than a de minimis use for a commercial recreational activity.

(C) Individual described

An individual is described in this subparagraph if such individual is—

(i) the decedent,

(ii) a member of the decedent's family,

(iii) the executor of the decedent's estate, or

(iv) the trustee of a trust the corpus of which includes the land to be subject to the qualified conservation easement.

(D) Member of family

The term "member of the decedent's family" means any member of the family (as defined in section 2032A(e)(2)) of the decedent.

(9) Treatment of easements granted after death

In any case in which the qualified conservation easement is granted after the date of the decedent's death and on or before the due date (including extensions) for filing the return of tax imposed by section 2001, the deduction under section 2055(f) with respect to such easement shall be allowed to the estate but only if no charitable deduction is allowed under chapter 1 to any person with respect to the grant of such easement.

(10) Application of this section to interests in partnerships, corporations, and trusts

This section shall apply to an interest in a partnership, corporation, or trust if at least 30 percent of the entity is owned (directly or indirectly) by the decedent, as determined under the rules described in section 2057(e)(3).

(d) Cross reference

For executor's right to be furnished on request a statement regarding any valuation made by the Secretary within the gross estate, see section 7517.

(Aug. 16, 1954, ch. 736, 68A Stat. 380; Pub. L. 87–834, § 18(a)(1), Oct. 16, 1962, 76 Stat. 1052; Pub. L. 94–455, title XX, § 2008(a)(2)(A), Oct. 4, 1976, 90 Stat. 1891; Pub. L. 105–34, title V, § 508(a), Aug. 5, 1997, 111 Stat. 857; Pub. L. 105–206, title VI, § 6007(g), July 22, 1998, 112 Stat. 810; Pub. L. 105–277, div. J, title IV, § 4006(c)(3), Oct. 21, 1998, 112 Stat. 2681–913; Pub. L. 107–16, title V, § 551(a), (b), June 7, 2001, 115 Stat. 86.)

AMENDMENT OF SECTION

For termination of amendment by section 901 of Pub. L. 107–16, see Effective and Termination Dates of 2001 Amendment note below.

AMENDMENTS

2001—Subsec. (c)(2). Pub. L. 107–16, §§ 551(b), 901, temporarily inserted at end "The values taken into account under the preceding sentence shall be such values as of the date of the contribution referred to in paragraph (8)(B)." See Effective and Termination Dates of 2001 Amendment note below.

Subsec. (c)(8)(A)(i). Pub. L. 107–16, §§ 551(a), 901, temporarily amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "which is located—

"(I) in or within 25 miles of an area which, on the date of the decedent's death, is a metropolitan area (as defined by the Office of Management and Budget),

"(II) in or within 25 miles of an area which, on the date of the decedent's death, is a national park or wilderness area designated as part of the National Wilderness Preservation System (unless it is determined by the Secretary that land in or within 25 miles of such a park or wilderness area is not under significant development pressure), or

"(III) in or within 10 miles of an area which, on the date of the decedent's death, is an Urban National Forest (as designated by the Forest Service),".

See Effective and Termination Dates of 2001 Amendment note below.

1998—Subsec. (c)(6). Pub. L. 105–206, § 6007(g)(2), substituted "on or before the due date (including extensions) for filing the return of tax imposed by section 2001 and shall be made on such return." for "on the return of the tax imposed by section 2001."

Subsec. (c)(9). Pub. L. 105–206, § 6007(g)(1), added par. (9). Former par. (9) redesignated (10).

Subsec. (c)(10). Pub. L. 105–277, § 4006(c)(3), substituted "section 2057(e)(3)" for "section 2033A(e)(3)".

Pub. L. 105–206, § 6007(g)(1), redesignated par. (9) as (10).

1997—Subsecs. (c), (d). Pub. L. 105–34 added subsec. (c) and redesignated former subsec. (c) as (d).

1976—Subsec. (c). Pub. L. 94–455 added subsec. (c).

1962—Subsec. (a). Pub. L. 87–834 struck out provisions which excepted real property situated outside the United States.

EFFECTIVE AND TERMINATION DATES OF 2001 AMENDMENT

Pub. L. 107–16, title V, § 551(c), June 7, 2001, 115 Stat. 86, provided that: "The amendments made by this section [amending this section] shall apply to estates of decedents dying after December 31, 2000."

Amendment by Pub. L. 107–16 inapplicable to estates of decedents dying, gifts made, or generation skipping transfers, after Dec. 31, 2010, and the Internal Revenue Code of 1986 to be applied and administered to such estates, gifts, and transfers as if such amendment had never been enacted, see section 901 of Pub. L. 107–16, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–206 effective, except as otherwise provided, as if included in the provisions of the Taxpayer Relief Act of 1997, Pub. L. 105–34, to which such amendment relates, see section 6024 of Pub. L. 105–206, set out as a note under section 1 of this title.

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–34 applicable to estates of decedents dying after Dec. 31, 1997, see section 508(e)(1) of Pub. L. 105–34, set out as a note under section 1014 of this title.

EFFECTIVE DATE OF 1962 AMENDMENT

Section 18(b) of Pub. L. 87–834 provided that:

"(1) Except as provided in paragraph (2), the amendments made by subsection (a) [amending this section and sections 2033, 2034, 2035, 2036, 2037, 2038, 2040, and 2041 of this title] shall apply to the estates of decedents dying after the date of the enactment of this Act [Oct. 16, 1962].

"(2) In the case of a decedent dying after the date of the enactment of this Act [Oct. 16, 1962] and before July 1, 1964, the value of real property situated outside of the United States shall not be included in the gross estate (as defined in section 2031(a)) of the decedent—

"(A) under section 2033, 2034, 2035(a), 2036(a), 2037(a), or 2038(a) to the extent the real property, or the decedent's interest in it, was acquired by the decedent before February 1, 1962;

"(B) under section 2040 to the extent such property or interest was acquired by the decedent before Feb-

(3) Date of creation of power

For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942.

(Aug. 16, 1954, ch. 736, 68A Stat. 385; Pub. L. 87–834, § 18(a)(2)(H), Oct. 16, 1962, 76 Stat. 1052; Pub. L. 94–455, title XX, § 2009(b)(4)(A), Oct. 4, 1976, 90 Stat. 1894.)

AMENDMENTS

1976—Subsec. (a)(2). Pub. L. 94–455 struck out provision that a disclaimer or renunciation of a power of appointment not be deemed a release of that power.

1962—Subsec. (a). Pub. L. 87–834 struck out provisions which excepted real property situated outside of the United States.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 applicable to transfers creating an interest in person disclaiming made after Dec. 31, 1976, see section 2009(e)(2) of Pub. L. 94–455, set out as a note under section 2518 of this title.

EFFECTIVE DATE OF 1962 AMENDMENT

Amendment by Pub. L. 87–834 applicable to estates of decedents dying after Oct. 16, 1962, except as otherwise provided, see section 18(b) of Pub. L. 87–834, set out as a note under section 2031 of this title.

§ 2042. Proceeds of life insurance

The value of the gross estate shall include the value of all property—

(1) Receivable by the executor

To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) Receivable by other beneficiaries

To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

(Aug. 16, 1954, ch. 736, 68A Stat. 387; Pub. L. 94–455, title XIX, § 1906(b)(13) (A), Oct. 4, 1976, 90 Stat. 1834.)

AMENDMENTS

1976—Pub. L. 94–455 struck out "or his delegate" after "Secretary".

§ 2043. Transfers for insufficient consideration

(a) In general

If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

(b) Marital rights not treated as consideration

(1) In general

For purposes of this chapter, a relinquishment or promised relinquishment of dower or 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".

(2) Exception

For purposes of section 2053 (relating to expenses, indebtedness, and taxes), a transfer of property which satisfies the requirements of paragraph (1) of section 2516 (relating to certain property settlements) shall be considered to be made for an adequate and full consideration in money or money's worth.

(Aug. 16, 1954, ch. 736, 68A Stat. 388; Pub. L. 98–369, div. A, title IV, § 425(a)(1), July 18, 1984, 98 Stat. 803.)

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–369 amended subsec. (b) generally, designating existing provisions as par. (1) and adding par. (2).

EFFECTIVE DATE OF 1984 AMENDMENT

Section 425(c)(1) of Pub. L. 98–369 provided that: "The amendments made by subsection (a) [amending this section and section 2053 of this title] shall apply to estates of decedents dying after the date of the enactment of this Act [July 18, 1984]."

§ 2044. Certain property for which marital deduction was previously allowed

(a) General rule

The value of the gross estate shall include the value of any property to which this section applies in which the decedent had a qualifying income interest for life.

(b) Property to which this section applies

This section applies to any property if—

(1) a deduction was allowed with respect to the transfer of such property to the decedent—

(A) under section 2056 by reason of subsection (b)(7) thereof, or

(B) under section 2523 by reason of subsection (f) thereof, and

(2) section 2519 (relating to dispositions of certain life estates) did not apply with respect to a disposition by the decedent of part or all of such property.

(c) Property treated as having passed from decedent

For purposes of this chapter and chapter 13, property includible in the gross estate of the decedent under subsection (a) shall be treated as property passing from the decedent.

(Added Pub. L. 97–34, title IV, §403(d)(3)(A)(i), Aug. 13, 1981, 95 Stat. 304; amended Pub. L. 97–448, title I, §104(a)(1)(B), Jan. 12, 1983, 96 Stat. 2380.)

PRIOR PROVISIONS

A prior section 2044 was renumbered section 2045 of this title.

AMENDMENTS

1983—Subsec. (c). Pub. L. 97–448 added subsec. (c).

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 97–448 effective, except as otherwise provided, as if it had been included in the provision of the Economic Recovery Tax Act of 1981, Pub. L. 97–34, to which such amendment relates, see section 109 of Pub. L. 97–448, set out as a note under section 1 of this title.

EFFECTIVE DATE

Section applicable to estates of decedents dying after Dec. 31, 1981, see section 403(e) of Pub. L. 97–34, set out as an Effective Date of 1981 Amendment note under section 2056 of this title.

§2045. Prior interests

Except as otherwise specifically provided by law, sections 2034 to 2042, inclusive, shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whenever made, created, arising, existing, exercised, or relinquished.

(Aug. 16, 1954, ch. 736, 68A Stat. 388, §2044; Pub. L. 94–455, title XX, §2001(c)(1)(M), Oct. 4, 1976, 90 Stat. 1853; renumbered §2045, Pub. L. 97–34, title IV, §403(d)(3)(A)(i), Aug. 13, 1981, 95 Stat. 304.)

PRIOR PROVISIONS

A prior section 2045 was renumbered section 2046 of this title.

AMENDMENTS

1976—Pub. L. 94–455 substituted "specifically provided by law" for "specifically provided therein".

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 applicable to estates of decedents dying after Dec. 31, 1976, see section 2001(d) of Pub. L. 94–455, set out as a note under section 2001 of this title.

§2046. Disclaimers

For provisions relating to the effect of a qualified disclaimer for purposes of this chapter, see section 2518.

(Added Pub. L. 94–455, title XX, §2009(b)(2), Oct. 4, 1976, 90 Stat. 1893, §2045; renumbered §2046, Pub. L. 97–34, title IV, §403(d)(3)(A)(i), Aug. 13, 1981, 95 Stat. 304.)

EFFECTIVE DATE

Section applicable to transfers creating an interest in person disclaiming made after Dec. 31, 1976, see section 2009(e)(2) of Pub. L. 94–455, set out as a note under section 2518 of this title.

PART IV—TAXABLE ESTATE

AMENDMENTS

2001—Pub. L. 107–16, title V, §532(c)(14), June 7, 2001, 115 Stat. 75, added item 2058.

1998—Pub. L. 105–206, title VI, §6006(b)(1)(F), July 22, 1998, 112 Stat. 808, added item 2057.

1990—Pub. L. 101–508, title XI, §11704(a)(39), Nov. 5, 1990, 104 Stat. 1388–520, amended directory language of section 5033(a)(3) of Pub. L. 100–647. See 1988 Amendment note below.

Pub. L. 101–508, title XI, §11704(a)(16), Nov. 5, 1990, 104 Stat. 1388–518, substituted "trust" for "trusts" in item 2056A.

1989—Pub. L. 101–239, title VII, §7304(a)(2)(E), Dec. 19, 1989, 103 Stat. 2353, struck out item 2057 "Sales of employer securities to employee stock ownership plans or worker-owned cooperatives".

1988—Pub. L. 100–647, title V, §5033(a)(3), Nov. 10, 1988, 102 Stat. 3672, as amended by Pub. L. 101–508, title XI, §11704(a)(39), Nov. 5, 1990, 104 Stat. 1388–520, added item 2056A.

1986—Pub. L. 99–514, title XI, §1172(b)(3), Oct. 22, 1986, 100 Stat. 2515, added item 2057.

1981—Pub. L. 97–34, title IV, §427(b), Aug. 13, 1981, 95 Stat. 318, struck out item 2057 "Bequests, etc., to certain minor children".

1976—Pub. L. 94–455, title XX, §§2001(c)(1)(N)(iv), 2007(b), Oct. 4, 1976, 90 Stat. 1853, 1890, added item 2057 and struck out item 2052 "Exemption".

§2051. Definition of taxable estate

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the deductions provided for in this part.

(Aug. 16, 1954, ch. 736, 68A Stat. 388; Pub. L. 95–600, title VII, §702(r)(2), Nov. 6, 1978, 92 Stat. 2938.)

AMENDMENTS

1978—Pub. L. 95–600 struck out "exemption and" after "gross estate the".

EFFECTIVE DATE OF 1978 AMENDMENT

Section 702(r)(5) of Pub. L. 95–600 provided that: "The amendments made by this subsection [amending this section and sections 1016, 6324B, and 6698A of this title] shall apply to estates of decedents dying after December 31, 1976."

EFFECTIVE DATE OF 1974 AMENDMENT

Section 3(b) of Pub. L. 93–483 provided that: "The amendment made by subsection (a) [amending this section] shall apply with respect to estates of decedents dying after December 31, 1969."

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91–614 applicable with respect to decedents dying after Dec. 31, 1970, see section 101(j) of Pub. L. 91–614, set out as an Effective Date note under section 2032 of this title.

EFFECTIVE DATE OF 1969 AMENDMENT

Amendment by section 201(d)(1) of Pub. L. 91–172 applicable in the case of decedents dying after Dec. 31, 1969, with specified exceptions, see section 201(g)(4) of Pub. L. 91–172, set out as a note under section 170 of this title.

Amendment by section 201(d)(4)(A) of Pub. L. 91–172 applicable to gifts and transfers made after Dec. 31, 1969, see section 201(g)(4)(E) of Pub. L. 91–172, set out as a note under section 170 of this title.

EFFECTIVE DATE OF 1956 AMENDMENT

Section 3 of act Aug. 6, 1956, provided that: "The amendments made by this Act [amending this section and section 6503 of this title] shall apply in the case of decedents dying after August 16, 1954."

TRANSFER OF FUNCTIONS

United States International Development Cooperation Agency (other than Agency for International Development and Overseas Private Investment Corporation) abolished and functions and authorities transferred, see sections 6561 and 6562 of Title 22, Foreign Relations and Intercourse.

SPECIAL DONATIONS

Section 1422(d) of Pub. L. 99–514 provided that: "If the Secretary of the Interior acquires by donation after December 31, 1986, a conservation easement (within the meaning of section 2(h) of S. 720, 99th Congress, 1st Session, as in effect on August 16, 1986) [see Pub. L. 99–420, Sept. 25, 1986, §102(h), 99 Stat. 955, 957], such donation shall qualify for treatment under section 2055(f) or 2522(d) of the Internal Revenue Code of 1954 [now 1986], as added by this section."

CHARITABLE LEAD TRUSTS AND CHARITABLE REMAINDER TRUSTS IN CASE OF INCOME AND GIFT TAXES

Section 514(b) of Pub. L. 95–600, as amended by Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: "Under regulations prescribed by the Secretary of the Treasury or his delegate, in the case of trusts created before December 31, 1977, provisions comparable to section 2055(e)(3) of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] (as amended by subsection (a)) shall be deemed to be included in sections 170 and 2522 of the Internal Revenue Code of 1986."

EXTENSION OF PERIOD FOR FILING CLAIM FOR REFUND

Section 1304(b) of Pub. L. 94–455, as amended by Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095, provided that: "A claim for refund or credit of an overpayment of the tax imposed by section 2001 of the Internal Revenue Code of 1986 [formerly I.R.C. 1954] allowable under section 2055(e)(3) of such Code (as amended by subsection (a)) shall not be denied because of the expiration of the time for filing such a claim under section 6511(a) if such claim is filed not later than June 30, 1978."

§ 2056. Bequests, etc., to surviving spouse

(a) Allowance of marital deduction

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the case of life estate or other terminable interest

(1) General rule

Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

(2) Interest in unidentified assets

Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(3) Interest of spouse conditional on survival for limited period

For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

(4) Valuation of interest passing to surviving spouse

In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) Life estate with power of appointment in surviving spouse

In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(6) Life insurance or annuity payments with power of appointment in surviving spouse

In the case of an interest in property passing from the decedent consisting of proceeds under a life insurance, endowment, or annuity contract, if under the terms of the contract such proceeds are payable in installments or are held by the insurer subject to an agreement to pay interest thereon (whether the proceeds, on the termination of any interest payments, are payable in a lump sum or in annual or more frequent installments), and such installment or interest payments are payable annually or at more frequent intervals, commencing not later than 13 months after the decedent's death, and all amounts, or a specific portion of all such amounts, payable during the life of the surviving spouse are payable only to such spouse, and such spouse has the power to appoint all amounts, or such specific portion, payable under such contract (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), with no power in any other person to appoint such amounts to any person other than the surviving spouse—

(A) such amounts shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of such amounts shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if, under the terms of the contract, such power in the surviving spouse to appoint such amounts, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(7) Election with respect to life estate for surviving spouse

(A) In general

In the case of qualified terminable interest property—

(i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse, and

(ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified terminable interest property defined

For purposes of this paragraph—

(i) In general

The term "qualified terminable interest property" means property—

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying income interest for life

The surviving spouse has a qualifying income interest for life if—

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and

(II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii) Property includes interest therein

The term "property" includes an interest in property.

(iv) **Specific portion treated as separate property**

A specific portion of property shall be treated as separate property.

(v) **Election**

An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.

(C) **Treatment of survivor annuities**

In the case of an annuity included in the gross estate of the decedent under section 2039 (or, in the case of an interest in an annuity arising under the community property laws of a State, included in the gross estate of the decedent under section 2033) where only the surviving spouse has the right to receive payments before the death of such surviving spouse—

(i) the interest of such surviving spouse shall be treated as a qualifying income interest for life, and

(ii) the executor shall be treated as having made an election under this subsection with respect to such annuity unless the executor otherwise elects on the return of tax imposed by section 2001.

An election under clause (ii), once made, shall be irrevocable.

(8) **Special rule for charitable remainder trusts**

(A) **In general**

If the surviving spouse of the decedent is the only beneficiary of a qualified charitable remainder trust who is not a charitable beneficiary nor an ESOP beneficiary, paragraph (1) shall not apply to any interest in such trust which passes or has passed from the decedent to such surviving spouse.

(B) **Definitions**

For purposes of subparagraph (A)—

(i) **Charitable beneficiary**

The term "charitable beneficiary" means any beneficiary which is an organization described in section 170(c).

(ii) **ESOP beneficiary**

The term "ESOP beneficiary" means any beneficiary which is an employee stock ownership plan (as defined in section 4975(e)(7)) that holds a remainder interest in qualified employer securities (as defined in section 664(g)(4)) to be transferred to such plan in a qualified gratuitous transfer (as defined in section 664(g)(1)).

(iii) **Qualified charitable remainder trust**

The term "qualified charitable remainder trust" means a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664).

(9) **Denial of double deduction**

Nothing in this section or any other provision of this chapter shall allow the value of any interest in property to be deducted under this chapter more than once with respect to the same decedent.

(10) **Specific portion**

For purposes of paragraphs (5), (6), and (7)(B)(iv), the term "specific portion" only includes a portion determined on a fractional or percentage basis.

(c) **Definition**

For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

(d) **Disallowance of marital deduction where surviving spouse not United States citizen**

(1) **In general**

Except as provided in paragraph (2), if the surviving spouse of the decedent is not a citizen of the United States—

(A) no deduction shall be allowed under subsection (a), and

(B) section 2040(b) shall not apply.

(2) **Marital deduction allowed for certain transfers in trust**

(A) **In general**

Paragraph (1) shall not apply to any property passing to the surviving spouse in a qualified domestic trust.

(B) **Special rule**

If any property passes from the decedent to the surviving spouse of the decedent, for purposes of subparagraph (A), such property shall be treated as passing to such spouse in a qualified domestic trust if—

(i) such property is transferred to such a trust before the date on which the return of the tax imposed by this chapter is made, or

(ii) such property is irrevocably assigned to such a trust under an irrevocable assignment made on or before such date which is enforceable under local law.

(3) **Allowance of credit to certain spouses**

If—

(A) property passes to the surviving spouse of the decedent (hereinafter in this paragraph referred to as the "first decedent"),

(B) without regard to this subsection, a deduction would be allowable under subsection (a) with respect to such property, and

(C) such surviving spouse dies and the estate of such surviving spouse is subject to the tax imposed by this chapter,

the Federal estate tax paid (or treated as paid under section 2056A(b)(7)) by the first decedent with respect to such property shall be allowed as a credit under section 2013 to the estate of such surviving spouse and the amount of such credit shall be determined under such section without regard to when the first decedent died and without regard to subsection (d)(3) of such section.

(4) **Special rule where resident spouse becomes citizen**

Paragraph (1) shall not apply if—

(A) the surviving spouse of the decedent becomes a citizen of the United States before the day on which the return of the tax imposed by this chapter is made, and

(B) such spouse was a resident of the United States at all times after the date of the death of the decedent and before becoming a citizen of the United States.

(5) **Reformations permitted**

(A) **In general**

In the case of any property with respect to which a deduction would be allowable under subsection (a) but for this subsection, the determination of whether a trust is a qualified domestic trust shall be made—

(i) as of the date on which the return of the tax imposed by this chapter is made, or

(ii) if a judicial proceeding is commenced on or before the due date (determined with regard to extensions) for filing such return to change such trust into a trust which is a qualified domestic trust, as of the time when the changes pursuant to such proceeding are made.

(B) **Statute of limitations**

If a judicial proceeding described in subparagraph (A)(ii) is commenced with respect to any trust, the period for assessing any deficiency of tax attributable to any failure of such trust to be a qualified domestic trust shall not expire before the date 1 year after the date on which the Secretary is notified that the trust has been changed pursuant to such judicial proceeding or that such proceeding has been terminated.

(Aug. 16, 1954, ch. 736, 68A Stat. 392; Pub. L. 89-621, §1(a), Oct. 4, 1966, 80 Stat. 872; Pub. L. 94-455, title XIX, §1902(a)(12)(A), title XX, §§2002(a), 2009(b)(4)(D), (E), Oct. 4, 1976, 90 Stat. 1805, 1854, 1894; Pub. L. 95-600, title VII, §702(g)(1), (2), Nov. 6, 1978, 92 Stat. 2930; Pub. L. 97-34, title IV, §403(a)(1), (d)(1), Aug. 13, 1981, 95 Stat. 301, 302; Pub. L. 97-448, title I, §104(a)(2)(A), (8), Jan. 12, 1983, 96 Stat. 2380, 2381; Pub. L. 98-369, div. A, title X, §1027(a), July 18, 1984, 98 Stat. 1031; Pub. L. 100-647, title V, §5033(a)(1), title VI, §6152(a), Nov. 10, 1988, 102 Stat. 3670, 3725; Pub. L. 101-239, title VII, §7815(d)(4)(A), (5), (6), (8), 7816(q), Dec. 19, 1989, 103 Stat. 2415, 2416, 2423; Pub. L. 101-508, title XI, §§11701(*l*)(1), 11702(g)(5), Nov. 5, 1990, 104 Stat. 1388-513, 1388-516; Pub. L. 102-486, title XIX, §1941(a), Oct. 24, 1992, 106 Stat. 3036; Pub. L. 105-34, title XIII, §1311(a), title XV, §1530(c)(8), Aug. 5, 1997, 111 Stat. 1044, 1078.)

AMENDMENTS

1997—Subsec. (b)(7)(C). Pub. L. 105-34, §1311(a), inserted "(or, in the case of an interest in an annuity arising under the community property laws of a State, included in the gross estate of the decedent under section 2033)" after "section 2039".

Subsec. (b)(8). Pub. L. 105-34, §1530(c)(8), amended par. (8) generally. Prior to amendment, par. (8) read as follows:

"(8) SPECIAL RULE FOR CHARITABLE REMAINDER TRUSTS.—

"(A) IN GENERAL.—If the surviving spouse of the decedent is the only noncharitable beneficiary of a qualified charitable remainder trust, paragraph (1) shall not apply to any interest in such trust which passes or has passed from the decedent to such surviving spouse.

"(B) DEFINITIONS.—For purposes of subparagraph (A)—

"(i) NONCHARITABLE BENEFICIARY.—The term 'noncharitable beneficiary' means any beneficiary of the qualified charitable remainder trust other than an organization described in section 170(c).

"(ii) QUALIFIED CHARITABLE REMAINDER TRUST.—The term 'qualified charitable remainder trust' means a charitable remainder annuity trust or charitable remainder unitrust (described in section 664)."

1992—Subsec. (b)(10). Pub. L. 102-486 added par. (10).

1990—Subsec. (d)(3). Pub. L. 101-508, §11702(g)(5), substituted "section 2056A(b)(7)" for "section 2056A(b)(6)".

Subsec. (d)(4), (5). Pub. L. 101-508, §11701(*l*)(1), redesignated par. (4) relating to reformations permitted as par. (5).

1989—Subsec. (b)(7)(C). Pub. L. 101-239, §7816(q), inserted "included in the gross estate of the decedent under section 2039" after "an annuity".

Subsec. (d)(2)(B). Pub. L. 101-239, §7815(d)(4)(A), substituted "Special rule" for "Property passing outside of probate estate" in heading and amended text generally. Prior to amendment, text read as follows: "If any property passes from the decedent to the surviving spouse of the decedent outside of the decedent's probate estate, for purposes of subparagraph (A), such property shall be treated as passing to such spouse in a qualified domestic trust if such property is transferred to such a trust before the day on which the return of the tax imposed by section 2001 is made."

Subsec. (d)(3). Pub. L. 101-239, §7815(d)(6), substituted "this chapter" for "section 2001" in subpar. (C) and inserted "and without regard to subsection (d)(3) of such section" after "first decedent died" in concluding provisions.

Subsec. (d)(4). Pub. L. 101-239, §7815(d)(8), added par. (4) relating to reformations permitted.

Pub. L. 101-239, §7815(d)(5), added par. (4) relating to special rule where resident spouse becomes citizen.

1988—Subsec. (b)(7)(C). Pub. L. 100-647, §6152(a), added subpar. (C).

Subsec. (d). Pub. L. 100-647, §5033(a)(1), added subsec. (d).

1984—Subsec. (b)(7)(B)(ii)(I). Pub. L. 98-369 inserted ", or has a usufruct interest for life in the property".

APPENDIX B

THE LAW OF FEDERAL GIFT AND ESTATE TAXATION

BY

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IN SIX VOLUMES

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II. Limitations on the Exercise by Congress of the Taxing Power

A. ESTATE AND GIFT TAXES AS INDIRECT TAXES

§ 1.02. ESTATE AND GIFT TAXES ARE IMPOSED ON THE PRIVILEGE OF TRANSFER. The modern estate and gift tax laws have been upheld as an excise tax on the privilege of transfer of property,[9]

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life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[9] It is well settled that the federal estate tax is an excise tax requiring no apportionment, as is required where the statute imposes a direct tax on property. See Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405 (1929), 7AFTR8844; Greiner, Exec. v. Lewellyn, 258 U.S. 384, 42 S.Ct. 324, 66 L.Ed. 676 (1922), 3AFTR3136; New York Trust Co., Ex'rs v. Eisner, 256 U.S. 345, 41 S.Ct. 506, 65 L.Ed. 963 (1921), 3AFTR3110. See also Mertens, LOFIT, § 4.08.

The Supreme Court first sustained the constitutionality of a federal estate tax in 1874 when the succession tax of 1864 was upheld against an attack on the ground that it was invalid as an unapportioned direct tax. Scholey v. Rew, 90 U.S. (23 Wall.) 331, 23 L.Ed. 99 (1874), 2AFTR2345. The 1864 tax had already been repealed at the time of this decision and the issue remained moot thereafter until 1894. In that year Congress passed an income tax act which contained a provision including as income property acquired by gift or inheritance. The Supreme Court declared this act unconstitutional as it applied to income from real estate. Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895), 3AFTR2557, on rehearing 158 U.S. 601, 15 S.Ct. 912, 39 L.Ed. 1108 (1895), 3AFTR2602(i.t.).

However, when, in 1898, another succession tax was passed, its constitutionality was upheld in the leading case of Knowlton, Ex'rs v. Moore, 178 U.S. 41, 20 S.Ct. 747, 44 L.Ed. 969 (1900), 3AFTR2684. In a lengthy and exhaustive opinion, the Court found that the arguments under which the 1894 Act had been declared unconstitutional applied only to the income tax features of the act, that the succession tax was not a direct tax, that it was uniform and that it did adhere to due process.

The reasoning of the Court in the Knowlton case was so definitive that when the modern estate tax was passed in 1916, its constitutionality was upheld practically without discussion. New York Trust Co., Ex'rs v. Eisner, supra. The fact that the 1916 Act was an estate tax whereas the prior acts had imposed succession taxes made no difference.

The answer to the question of the validity of the gift tax was simplified by the fact that the Supreme Court did not have to face the issue until the estate tax cases, referred to above, had been decided. When the case did thus avoiding the prohibition against direct taxes on property without apportionment. The distinction between a direct tax on property and an excise on the transfer of property is neither illusory nor inconsequential. It is so fundamental that it has been made the basis for sustaining a tax of the latter character even though the subject of the transfer itself was tax-exempt. Thus the Federal Government may impose an estate tax on a gross estate which consists wholly of tax-exempt state or municipal bonds.[10] Such transfer concept supports a tax, without apportionment, on the shifting from one to another of any power or legal privilege incidental to the ownership or enjoyment of property. The Supreme Court in holding that the gift tax did not constitute a direct tax has rejected the proposition that taxes on the exercise of all rights and powers incident to ownership amounted to a direct tax on the property itself; hence, a tax on the exercise of individual rights and powers is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his prop-

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come up, the Court upheld the gift tax against the usual objections after finding that there was no "intelligible distinction", for constitutional purposes, between the estate and gift taxes. Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226 (1929), 8AFTR10251 (g.t.).

[10] Greiner v. Lewellyn, 258 U.S. 384, 42 S.Ct. 324, 66 L.Ed. 676 (1922), 3AFTR3136; U.S. Trust Co. of N.Y., Exec. v. Helvering, 307 U.S. 57, 59 S.Ct. 692, 83 L.Ed. 1104 (1939), 22AFTR327. See § 14.17.

In Landman v. Comm., 123 F(2d) 787 (10th Cir.1941), 28AFTR417, aff'g 42 BTA 958, cert.den. 315 U.S. 810, 62 S.Ct. 799, 86 L.Ed. 1209 (1942), the estate of a member of an Indian tribe granted certain tax exemptions was held subject to estate tax, since the latter fell "upon the transfer or shifting of the economic benefits and not upon the property of which the estate [was] composed." Consequently, there was not available in this instance "any constitutional immunity growing out of [agreements] between the United States and Creek Indian".

The statement in the text is in part from the opinion in 42 BTA 958, supra, in which it is also said:

"Likewise it was held in United States Trust Co. v. Helvering, 307 U.S. 57, that the proceeds of a War Risk Insurance policy payable to a deceased veteran's widow was subject to Federal estate tax. In that case the executor of the estate contended that the proceeds of such policy should not be included in the estate because of the provisions of the World War Veterans Act, 43 Stat. 607, which provided that 'insurance . . . shall be exempt from all taxation.'"

But compare Landman v. U.S., 71 F.Supp. 640 (Ct.Cl.1947), 35AFTR1331, erty.[11] The Supreme Court has said[12] that the power to impose estate taxes:

> "extends to the creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property, and when any of these is occasioned by death, it may as readily be the subject of the federal tax as the transfer of the property at death",[13]

and that:

> "The power to tax the whole necessarily embraces the power to tax any of its incidents or the use or enjoyment of them. If the property itself may constitutionally be taxed, obviously it is competent to tax the use of it . . . or the gift of

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cert.den. 332 U.S. 815, 68 S.Ct. 153, 92 L.Ed. 392 (1947), and Landman v. U.S., (Ct.Cl.1945), 34AFTR1662, superseding 58 F.Supp. 836 (Ct.Cl.1945), 33AFTR 811.

[11] In Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46, 74 L.Ed. 226 (1929), 8AFTR10251 (g.t.), the Supreme Court stated: "Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, . . . and hence a direct tax requiring apportionment, that is not the case before us."

The same contention was made 10 years later in Dupont v. Deputy, 26 F. Supp. 773 (D.Del.1939), 22AFTR788 (g.t.), the taxpayer emphasizing what he felt to be the netlike incidences of taxes in connection with the ownership of stock: income taxes imposed on dividends and on capital gains following its sale, estate taxes on its devolution at death, and gift taxes on its transfer without consideration during life. The court summarily rejected this argument, citing Bromley v. McCaughn, supra, and added that the "controlling authority of that case" was not affected by a provision in the 1932 Act rendering the gift tax a lien upon the property given and the donee personally liable for payment to the extent of its value.

[12] Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116 (1945), 34AFTR276, reh.den. 327 U.S. 814, 66 S.Ct. 525, 90 L.Ed. 1038 (1946).

[13] A broader view was expressed in Chickering, Adm. v. Comm., 118 F(2d) 254 (1st Cir.1941), 26AFTR663, cert.den. 314 U.S. 636, 62 S.Ct. 70, 86 L.Ed. 511 (1941), to the effect that:

"... the estate tax is not a direct tax upon the property; nor is it in a strict sense a tax upon a 'transfer' of the property by the death of the decedent. It is an excise tax upon the happening of an event, namely, death, where the death brings about certain described changes in legal relationships affecting property. The value of the property so affected is merely used as a factor in the measurement of the excise tax."

But this view has never been adopted by the Supreme Court.

> it . . . . It may tax the exercise, non-exercise, or relinquishment of a power of disposition of property, where other important indicia of ownership are lacking."

In line therewith taxation of the proceeds of life insurance payable to third persons was upheld where decedent retained the power to change the beneficiary and to surrender or pledge the policy, since these incidents of ownership were, in effect, transferred on death.[14]

§ 1.03. DEVELOPMENT OF THE MODERN CONCEPT OF A TRANSFER. The courts in applying the indirect tax theory to particular provisions of the estate tax law have evidenced considerable ingenuity in expanding the term "transfer" to meet the necessities of each new challenge.[15] The earlier cases rested on the fact that there was a "passing" of property from decedent at death.[16] Such passing concept did not require, however, that the term "transfer" be limited to those situations where there was a transfer in the technical, local law sense of the term, since Congress can completely disregard the refinements of state property law and rely on more realistic classifications.[17] Thus local characteristics of dower,[18] joint tenancies and tenancies by the entirety,[19] community property,[20] and life insurance proceeds[21]

[14] Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405 (1929), 7AFTR8844.

[15] Since taxes are based on the "fundamental and imperious necessity of all government", it is obvious that the Supreme Court will reach for theories, definitions, and apologia to avoid a successful constitutional attack. This task has been ably performed.

[16] See §§ 19.26, 23.17 discussing the "passing" requirement.

[17] Fernandez v. Wiener, supra, n.12. See especially the concurring opinion of Mr. Justice Douglas.

[18] See Mayer, Trustees v. Reinecke, 130 F(2d) 350 (7th Cir.1942), 29AFTR 1156, cert.den. 317 U.S. 684, 63 S.Ct. 257, 87 L.Ed. 548 (1942); Allen v. Henggeler, Adm., 32 F(2d) 69 (8th Cir.1929), 7AFTR8680, cert.den. 280 U.S. 594, 50 S.Ct. 40, 74 L.Ed. 642 (1929); Nyberg, Adm. v. U.S., 66 Ct.Cl. 153 (1928), 6AFTR7845, cert.den. 278 U.S. 646, 49 S.Ct. 82, 73 L.Ed. 559 (1928).

[19] See U.S. v. Jacobs, Exec., 306 U.S. 363, 59 S.Ct. 551, 83 L.Ed. 763 (1939), 22AFTR282, motion to set aside judgment denied 306 U.S. 620, 59 S.Ct. 640, 83 L.Ed. 1026 (1939); Dimock, Exec. v. Corwin, 306 U.S. 363, 59 S.Ct. 551, 83 L.Ed. 763 (1939), 22AFTR282 (companion cases); Gwinn v. Comm., 287 U.S. 224, 53 S.Ct. 157, 77 L.Ed. 270 (1932), 11AFTR1092; Phillips v. Dime

have been disregarded. The constitutionality of a federal taxing act is not dependent upon conformity with state law. If such were the case, then an admittedly constitutional federal act could be rendered unconstitutional by a subsequent state enactment.[22] None of the successful constitutional attacks on the federal estate and gift tax provisions cases affected the established freedom of Congress to ignore the local law of property in the absence of arbitrariness or capriciousness.[23] On the con-

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Trust & Safe Deposit Co., Exec., 284 U.S. 160, 52 S.Ct. 46, 76 L.Ed. 220 (1931), 10AFTR459; Tyler, Jr., Adm'rs v. U.S., 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991 (1930), 8AFTR10912.

[20] See Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116 (1945), 34AFTR276, reh.den. 327 U.S. 814, 66 S.Ct. 525, 90 L.Ed. 1038 (1946); U.S. v. Rompel, Jr., Adm., 326 U.S. 367, 66 S.Ct. 191, 90 L.Ed. 137 (1946), 34AFTR 289, reh.den. 327 U.S. 814, 66 S.Ct. 526, 90 L.Ed. 1038 (1946); Beavers v. Comm., 165 F(2d) 208 (5th Cir.1947), 36AFTR514, cert.den. 334 U.S. 811, 68 S.Ct. 1017, 92 L.Ed. 1743 (1948) (g.t.); Charles I. Francis, 8 TC 822 (g.t.).

[21] See Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., 278 U.S. 327, 49 S.Ct. 126, 73 L.Ed. 405 (1929), 7AFTR8844; Lewellyn v. Frick, Ex'rs, 268 U.S. 238, 45 S.Ct. 487, 69 L.Ed. 934 (1925), 5AFTR5383, had earlier held contra, at least by inference; but see Kohl, Ex'rs v. U.S., 226 F(2d) 381 (7th Cir.1955), 47 AFTR2022, which involved the "payment of premiums" test which was then applied in determining what insurance should be included in the gross estate, and in which the tax in effect was held unconstitutional as imposing an unapportioned direct tax.

[22] Continental Ill. Bank & Trust Co., Exec. v. U.S., 65 F(2d) 506 (7th Cir. 1933), 12AFTR816, cert.den. 290 U.S. 663, 54 S.Ct. 77, 78 L.Ed. 573 (1933), rejecting the contention that a provision, requiring the inclusion of property in the gross estate only if subject to payment of administration expenses, violated the uniformity requirement because state laws vary as to whether real estate was subject to payment of administration expenses. See discussion in § 1.06 of the due process requirement.

[23] See (1) Nichols v. Coolidge, Ex'rs, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927), 6AFTR6758, holding Sec.402(c) of the 1919 Act unconstitutional as confiscatory and in violation of the Fifth Amendment insofar as it applied the possession and enjoyment section to transfers made prior to the act, where the transfers were not in fact testamentary or designed for tax evasion; (2) Untermyer v. Anderson, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645 (1928), 6AFTR 7789, rev'g 18 F(2d) 1023 (2d Cir.1927), which had aff'd an unreported district court opinion (g.t.), holding retroactive application of the gift tax provisions of the 1924 Act invalid under the Fifth Amendment; and (3) Heiner v. Donnan, Ex'rs, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), 10AFTR1609, holding unconstitutional, under the due process provisions of the Fifth Amendment, that part of Sec.302(a) of the 1926 Act which called for a conclusive pre-

trary, it has been held that the Tenth Amendment constituted no limitation on congressional power to tax even though there might be some incidental regulatory effect of such taxation on local community property systems.[24] The Fifth Amendment, which invalidates a tax which is so arbitrary and capricious as to constitute confiscation of property and hence a deprivation of property without due process of law, has similarly failed to restrain congressional power to disregard local characterizations in designating the objects to be taxed under the federal estate and gift tax law where the provision prevents avoidance.[25]

In accord with the view above expressed that congressional power is not limited to an imposition upon the "passing" of property, it is equally well settled with respect to the imposition of estate taxes that the power to tax is not limited to "substitutes for testamentary disposition", although the phrase may be relevant in interpreting the purpose and scope of a statutory provision. Applying this principle to property jointly held and tenancies by the entirety the Supreme Court has clearly indicated that the basis for the estate tax thereon was not that the creation of the tenancy was a substitute for a testamentary transfer, nor a taxable event which antedated the death of one of the joint owners, but rather the practical effect of death in bringing about a shift in economic interests permitting the legislature to fasten on that shift as the occasion for a tax.[26]

§ 1.04. — TRANSFER AS PRESENTLY DEFINED. The modern concept of a transfer, in the constitutional sense, is premised on the recognition that taxation is "eminently practical".[27] In the

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sumption that gifts made within 2 years of decedent's death were made in contemplation of death.

[24] Fernandez v. Wiener, supra, n.20.

[25] See discussion of due process in § 1.06.

[26] Fernandez v. Wiener, supra, n.20.

[27] In Tyler, Jr., Adm'rs v. U.S., 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991 (1930), 8AFTR10912, the Court made the following statement:

"Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor."

process of ruling out the "shadowy and intricate distinctions of common law property concepts"[28] and artificial rules which delimit the title, rights, and powers of tenants by the entirety (or joint tenancies) at common law,[29] the courts have striven to develop a concept of the term "transfer" which was both broad and flexible. The courts have said[30] that the estate tax provision was constitutional if there was a transfer of economic benefit,

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[28] See U.S. v. Jacobs, Exec., supra, n.19. This description as applied to the extent of congressional power to impose the tax is quite different from recourse to such common law precepts to determine the characteristics of such tenancies.

In this case it is also said: "By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the cotenant, and therefore—it is said—all the property can be taxed." As to this suggestion the Court says: "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."

The provisions with respect to dower are essentially aimed at those state decisions and local laws providing that dower interests are not includible in decedent's estate since they passed by operation of law and not by virtue of death. The dower provision was, therefore, inserted into the Code and the prior statutes to assure that the gross estate of a decedent would not be diminished by the value of dower or curtesy interests or statutory interests in lieu of dower or curtesy. See Estate of Harry E. Byram, 9 TC 1.

[29] Tyler, Jr., Adm'rs v. U.S., supra. See also Foster, Exec. v. Comm., 90 F(2d) 486 (9th Cir.1937), 19AFTR864, aff'd 303 U.S. 618, 58 S.Ct. 525, 82 L.Ed. 1083 (1938), 19AFTR1266, per curiam, reh.den. 303 U.S. 667, 58 S.Ct. 748, 82 L.Ed. 1124 (1938); O'Shaughnessy, Exec. v. Comm., 60 F(2d) 235 (6th Cir.1932), 11AFTR738, cert.den. 288 U.S. 605, 53 S.Ct. 397, 77 L.Ed. 980 (1933); Comm. v. Emery, Exec., 62 F(2d) 591 (7th Cir.1932), 11AFTR1340, rev'g and remanding 21 BTA 1038.

[30] The Supreme Court in Saltonstall v. Saltonstall, 276 U.S. 260, 48 S.Ct. 225, 72 L.Ed. 565 (1928), 7AFTR9303, in holding that a state inheritance tax could be levied on the value of an inter vivos trust set up by the decedent under which he retained the power to alter and revoke, said:

"So long as the privilege of succession has not been fully exercised it may be reached by the tax. [Citing cases.] And in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

The fact that, under state law, a power of appointment is not part of the probate estate, and that its transmission is not technically a "transfer" under local concepts, does not limit the federal power to tax such property. The use, enjoyment or control at death,[31] and it is now accepted that a passing or transfer of economic benefit is not required, though it may, of itself, justify the imposition of the tax.

It is well settled that, as used in the section imposing a tax "on the transfer of the taxable estate",[32] the word "transfer", or the privilege which constitutionally may be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It includes the "transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."[33] No formal transfer of title from the decedent to the transferee is required; a mere shifting of the economic benefits of property may be the real subject of the tax.[34] It also now seems settled that nothing need "pass" at death, in the testamentary sense. The Supreme Court, in upholding the taxation of the full value of property held by the decedent and his wife as tenants by the entirety, has suggested that when applied to a taxing act the amiable fiction of the common law that husband and wife are but one person and that accordingly by the death of one party to this unit no interest in

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constitutional limitations as to due process and direct taxation are satisfied since there is under local law a shifting of economic benefits at the time of death even though there is no technical transfer under local law.

[31] U.S. v. Jacobs, Exec., supra, n.19.

See also U.S. v. Waite, Ex'rs, 33 F(2d) 567 (8th Cir.1929), 7AFTR9184, rev'g and remanding 29 F(2d) 149 (W.D.Mo.1927), 7AFTR8288, cert.den. 280 U.S. 608, 50 S.Ct. 157, 74 L.Ed. 651 (1930); Estate of Laura Nelson Kirkwood, 23 BTA 955; Mercantile-Commerce Nat'l Bank in St. Louis, Ex'rs, 21 BTA 1347; Mary S. Garrison, Ex'rs, 21 BTA 904; Mattie McMullin, Exec., 20 BTA 527. See also Kurz, Ex'rs v. U.S., 156 F.Supp. 99 (S.D.N.Y.1957), aff'd — F(2d) — (2d Cir.1958), per curiam.

[32] I.R.C.1954, Sec.2001.

[33] Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., supra, n.14. This principle has been applied in numerous cases involving annuities. See, e.g., Hanner v. Glenn, 111 F.Supp. 52 (W.D.Ky.1953), 43AFTR748, aff'd 212 F(2d) 483 (6th Cir.1954), 45AFTR1444; Estate of Eugene F. Saxton, 12 TC 569; Estate of Isidor M. Stettenheim, 24 TC 1169 (1955-158); Estate of Paul G. Leoni, 11 TC 1140 (Memo.). See § 20.24.

[34] Chase Nat'l Bank of City of N.Y., Ex'rs v. U.S., supra, n.14; Tyler, Jr., Adm'rs v. U.S., supra, n.27 (tenancy by entirety); Fernandez v. Wiener, supra, n.20 (community property).

property held by them as tenants by the entirety passes to the other to be quite unsubstantial and that the power of taxation being, as it is, a fundamental and imperious necessity of all government was not to be restricted by such legal fictions. Whether such power so construed has been properly exercised as to any specific statutory enactment is to be determined by the actual results brought about by the death rather than by a consideration of the artificial rules which limit the title, rights, and powers of tenants by the entirety at common law.[35]

The modern explanations have been narrowed down to two factors: that decedent had an interest in property at death,[36] and that death became the generating source of definite accessions to the survivor's property rights.[37] His death is the source

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[35] See discussion in § 23.17 of cases of Comm. v. Estate of Church, 335 U.S. 632, 69 S.Ct. 322, 93 L.Ed. 288 (1949), 37AFTR480, and Estate of Spiegel v. Comm., 335 U.S. 701, 69 S.Ct. 301, 93 L.Ed. 330 (1949), 37AFTR459.

As to the application of the principle to a tenancy by the entirety see Tyler, Jr., Adm'rs v. U.S., supra, n.27.

[36] The dower provisions, it has been pointed out, are in no way a departure from the fundamental excise character of the federal estate tax: ". . . the statute does not tax the widow's dower, it merely uses it as a measure of that part of the deceased husband's interest in his realty which was beyond his testamentary control and which ceased at his death." Mayer, Trustees v. Reinecke, 130 F(2d) 350 (7th Cir.1942), 29AFTR1156, cert.den. 317 U.S. 684, 63 S.Ct. 257, 87 L.Ed. 548 (1942) (1921 Act, Sec.402(b)).

The courts in upholding the constitutionality of the dower provisions have pointed to the extensive rights (incidents of ownership) in such property determined under state law which ceased at the decedent's death and hence constituted a proper occasion for the levying of an estate tax. See, e.g., Allen v. Henggeler, Adm., 32 F(2d) 69 (8th Cir.1929), 7AFTR8680, cert.den. 280 U.S. 594, 50 S.Ct. 40, 74 L.Ed. 642 (1929), upholding the constitutionality of the 1924 Act, Sec.302(b). See also Nyberg, Adm. v. U.S., 66 Ct.Cl. 153 (1928), 6AFTR7845, cert.den. 278 U.S. 646, 49 S.Ct. 82, 73 L.Ed. 559 (1928), involving the 1921 Act, Sec.402(b).

[37] In Estate of Levy v. Comm., 65 F(2d) 412 (2d Cir.1933), 12AFTR791, involving certain insurance policies in which the insured retained no rights, the circuit court, in response to an argument of unconstitutionality as to their inclusion, cited other cases, stating: "By these cases, we think it is authoritatively established that the death of a tenant by the entirety results in the enjoyment of property rights in the survivor and furnishes the occasion for the imposition of the tax, if that event takes place after the passage of the taxing statute, regardless of when the tenancy was created."

As to the effect of a required consent of a person having an adverse interest of assurance to the beneficiaries that their rights are secure.[38] Both of these standards fall within the general principle that the underlying justification for imposing the estate tax on an inter vivos transfer is that it remains "incomplete" at death. The question is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result to be measured, in whole or in part, by the value of such rights.[39] The essential difference between the old and new rationalization of such justification is that incompleteness can be demonstrated either by ascertaining whether interests remained in the grantor or by determining whether the interests of the beneficiaries were enlarged, improved, or "ripened" at the time of the grantor's death. In demonstrating such incompleteness, substance rather than form or any particular device, is controlling.[40] Both factors had been previously expressed in several early constitutional cases,[41] although their influence was submerged by the fact that a number of the important decisions were rendered in cases which employed the "incomplete" test to determine whether a provision was arbitrarily retroactive under the Fifth Amendment.[42]

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to an exercise of a power of revocation by decedent where there was a transfer prior to 1924, see §§ 25.42, 25.43.

[38] Porter, Ex'rs v. Comm., 288 U.S. 436, 53 S.Ct. 451, 77 L.Ed. 880 (1933), 12AFTR25.

[39] The position of the Supreme Court in the Church and Spiegel cases was anticipated in Tyler, Jr., Adm'rs v. U.S., 281 U.S. 497, 50 S.Ct. 356, 74 L.Ed. 991 (1930), 8AFTR10912, which uses the language stated in the text. See §§ 23.17, 23.20 discussing I.R.C.1954, Sec.2037, covering the reversionary interest test under the transfer to take effect at death section.

[40] Comm. v. Estate of Church, supra, n.35.

[41] Phillips v. Dime Trust & Safe Deposit Co., Exec., 284 U.S. 160, 52 S.Ct. 46, 76 L.Ed. 220 (1931), 10AFTR459; Third Nat'l Bank & Trust Co. of Springfield, Ex'rs v. White, 287 U.S. 577, 53 S.Ct. 290, 77 L.Ed. 505 (1932), 11AFTR 1128, per curiam, involving property held by the decedent and spouse as tenants by the entirety. See also § 1.07, and Gwinn v. Comm., 287 U.S. 224, 53 S.Ct. 157, 77 L.Ed. 270 (1932), 11AFTR1092, involving property held by decedent and her son as joint tenants.

[42] Whether the transfer is complete, or something remains to be gained by

An "incomplete" transfer concept is also applicable to the gift tax,[43] although such concept has been formulated almost entirely on the basis of statutory interpretation rather than constitutional power.[44]

In applying both the estate and gift tax provisions, a basic element is that decedent have an interest in property which is capable of transfer, otherwise there could be no transfer, and any asserted tax would fail to satisfy the constitutional requirements that the tax involve the privilege of transfer and be not arbitrary and capricious. It has been held[45] that a taxable gift results when an inheritance is renounced. It has been argued,[46] however, that such a tax is so arbitrary and capricious as to violate the Fifth Amendment. Setting aside the merits of imposing such a tax,[47] it would appear that the tax can withstand a constitutional attack.[48] In a renunciation of a valid testa-

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the survivors or lost by the decedent, so that decedent's death may be taken as the event which justifies at that time the imposition of an estate tax, has also been a material issue in determining whether particular provisions are arbitrarily retroactive or capricious and prohibited by the Fifth Amendment. See § 1.07.

[43] The nature of a transfer under the gift tax provisions is discussed in §§ 34.29, 34.51 and 34.56.

[44] As in the case of the estate tax, state law concepts do not furnish the standards for the definition of a completed transfer.

[45] Hardenbergh v. Comm., 198 F(2d) 63 (8th Cir.1952), 42AFTR314, cert.den. 344 U.S. 836, 73 S.Ct. 45, 97 L.Ed. 650 (1952) (g.t.); William L. Maxwell, 17 TC 1589 (g.t.).

[46] Roehner and Roehner, "Renunciation as Taxable Gift—An Unconstitutional Federal Tax Decision", 8 Tax L.Rev. 289 (1953). Contra, Lauritzen, "Only God Can Make An Heir", 48 Northwestern U.L.Rev. 568 (1953).

[47] A.L.I. Tent.Draft No.11, Sec.X1007(h), specifically excludes the renunciation from the gift tax. See discussion therein, pp.31–40.

[48] In A.L.I. Tent.Draft No.11, at p.39, there is a good statement in support of this view and the distinctions that must be drawn:

"If it were proposed to impose a tax on a transfer of property which came about by a mere refusal to accept a gratuitous proffer of that property, which the profferor was under no obligation to deliver even if his proffer were accepted, an argument might be made against the constitutionality of such a tax, since the taxpayer never received the property or any attribute of ownership over it. The proffer never became a gift and there would be no tax on the intended donor. It would be incongruous to tax the intended donee in this situation, and here we need not even consider the constitutional aspects of this mentary power the necessary property interest is clearly present and the renunciation would qualify as a "transfer" for the purpose of determining whether the tax is indirect; there is nothing "arbitrary" in the due process sense of that term, particularly since renunciation is a voluntary act. That the imposition of a tax would not violate the necessity of "uniformity" is obviously not any longer a debatable question.

§ 1.05. —— SITUATIONS AKIN TO TRANSFERS AT DEATH. Although the estate tax "contemplation of death" statutory provision involves a complete and full transfer by decedent of all incidents

situation. But where there is a renunciation in the case of a gift which is complete as far as the donor is concerned, as in the case of a trust or testamentary situation, as contrasted with a situation where the donor still had the power to make the gift incomplete regardless of whether it was accepted or not, different considerations arise. Here, the tax would be imposed on the only affirmative act which could result in an effective gratuitous transfer to someone other than the person intended by the decedent or donor to be the first taker—and a strong argument in favor of the validity of this proposal can be made. There would be no immediate hardships involved if the intended first taker knew he would be subject to the tax, since he could then not renounce, pay the tax, and then give away the balance. However, there would be an effect on his subsequent tax bracket. Since the federal laws are not governed by local property law concepts of when title passes but with the realities of the exercise of control over a bundle of rights, all in all this proposal should be able to withstand a challenge as to its constitutionality. It would not seem unconstitutional to tax the exercise of control of the property here possessed by the intended first taker, even though he got into this position of control involuntarily.

"If the argument of unconstitutionality were to prevail where the person who renounced the property never received under local law any attribute of ownership over it other than the ability to renounce, then this result would preclude a rule which operated with reasonable uniformity throughout the United States. For the tax would then be able to withstand a challenge to its constitutionality only where, under the applicable state law, some attribute of ownership other than the power to renounce vested in the person, such as vesting of title or ability of his judgment creditors to reach the property despite his desire to reject it. But the consequent limitation of the tax to situations where the renouncing taxpayer had some such attribute of ownership over the renounced property under the applicable local law would hardly be a satisfactory result. It may well be that this result of non-uniformity in operation of the tax would have some supporting effect on the argument of constitutionality in the situation where no local law attributes of ownership were received. At any event, it is a consideration in favor of the rule adopted in the Draft."

APPENDIX C

C

West's Annotated Indiana Code Currentness
Title 6. Taxation
Article 4.1. Death Taxes
Chapter 2. Imposition of the Inheritance Tax

→ 6-4.1-2-4 Transfers of interests in property; transfers in contemplation of death; transfers for consideration

Sec. 4. (a) The inheritance tax applies to transfers of property interests described in subsection (d) and to the following types of property interest transfers:

(1) transfers which are made under a deceased transferor's will or under the laws of intestate succession, as a result of the transferor's death;

(2) transfers which are made in contemplation of the transferor's death;

(3) transfers which are made in such a manner that they are intended to take effect in possession or enjoyment at or after the transferor's death;

(4) transfers which are made in payment of a claim against the transferor's estate if:

(A) the claim results from a contract or antenuptial agreement made by the transferor; and

(B) payment of the amount claimed is due at or after the transferor's death under the terms of the transferor's will or the contract;

(5) those jointly held property transfers described in section 5 of this chapter;

(6) those transfers which are made by a trust deed in the manner described in section 6 of this chapter; and

(7) those transfers which are made to an executor or trustee in the manner described in section 7 of this chapter.

(b) A transfer is presumed to have been made in contemplation of the transferor's death if it is made within one (1) year before the transferor's date of death. However, the presumption is rebuttable.

(c) If a transfer described in subsection (a)(1), (a)(2), (a)(3), or (a)(4) is made for valuable consideration, the value of the property so transferred equals the remainder of:

(1) the total value of the property transferred; minus

(2) the equivalent in money value of the consideration received by the transferor.

For purposes of this subsection, the term "consideration" does not include love or affection.

(d) If at the time of death a surviving spouse has been entitled to income from a property interest that was the subject of a previous transfer exempt from inheritance tax under IC 6-4.1-3-7(b) or IC 6-4.1-3-7 (c), then the value of the property interest at the time of death of the surviving spouse is subject to the inheritance tax as if it were a transfer of property owned by the surviving spouse. The value of a property interest subject to inheritance tax under this section includes the value of each gift of any part of the property interest made by the surviving spouse in contemplation of death.

CREDIT(S)

As added by Acts 1976, P.L.18, SEC.1. Amended by Acts 1982, P.L.55, SEC.1; P.L.58-1990, SEC.1.

Current through 2010 Public Laws approved and effective through 3/25/2010 (except for P.L. 1-2010).

END OF DOCUMENT

APPENDIX D

VOLUME 12
Titles 458 (Chhs. 458-28 - 458-276) through Index

2007
WASHINGTON ADMINISTRATIVE CODE

Published under authority of chapters 1.08 and 34.05 RCW

Containing all permanent rules adopted under chapter 34.05 RCW, as of
January 1, 2007

STEP 2 - APPLICATION OF STRATUM RATIOS TO ACTUAL COUNTY ASSESSED VALUES

Stratum	(1) Actual County Personal Property Assessed Values	(2) Ratio	(3) County Market Value Related to Actual Assessed Value (Col. 1 ÷ Col. 2)
$ 0 - 74,999	$21,500,000	.773	$ 27,813,713
75,000 - 249,999	23,000,000	.528	43,560,606
Over - 250,000	50,000,000	.885	56,497,175
WAC 458-53-070 (4)(a) Properties	0		0
Totals	$94,500,000		÷ $127,871,499 = 73.9
County Indicated Personal Property Ratio			73.9%

[Statutory Authority: RCW 84.08.010, 84.08.070 and 84.48.075. 96-05-002, § 458-53-160, filed 2/8/96, effective 3/10/96; 94-05-064, § 458-53-160, filed 2/11/94, effective 3/14/94. Statutory Authority: RCW 84.48.075. 87-12-029 (Order PT 87-5), § 458-53-160, filed 5/29/87; 86-21-004 (Order PT 86-6), § 458-53-160, filed 10/2/86; 84-14-039 (Order PT 84-2), § 458-53-160, filed 6/29/84; 79-11-029 (Order PT 79-3), § 458-53-160, filed 10/11/79. Formerly WAC 458-52-100.]

WAC 458-53-200 Certification of county preliminary and indicated ratios—Review. (1) **Preliminary ratio certified to assessor.** The department shall annually determine the real property and personal property preliminary ratios for each county and shall certify these ratios to the county assessor on or before the first Monday in September.

(2) **Request for review.** Upon request of the assessor, a landowner, or an owner of an intercounty public utility or private car company, the department shall review the county's preliminary ratio with the requesting party and may make any changes indicated by such review. This review shall take place between the first and third Mondays of September. If the department does not certify the preliminary ratios as required by subsection (1) of this section, the review period shall extend for two weeks from the date of certification.

(3) **Certification of indicated ratios.** Prior to equalization of assessments pursuant to RCW 84.48.080 and after the third Monday of September, the department shall certify to each county assessor the indicated real and personal property ratios for that county.

[Statutory Authority: RCW 84.08.010, 84.08.070 and 84.48.075. 96-05-002, § 458-53-200, filed 2/8/96, effective 3/10/96. Statutory Authority: RCW 84.48.075. 84-14-039 (Order PT 84-2), § 458-53-200, filed 6/29/84; 79-11-029 (Order PT 79-3), § 458-53-200, filed 10/11/79. Formerly WAC 458-52-140.]

WAC 458-53-210 Appeals. If an assessor, landowner, or owner of an intercounty utility or private car company has reviewed the ratio study as provided in WAC 458-53-200, that person or company may appeal the department's indicated ratio determination, as certified for that county, to the state board of tax appeals pursuant to RCW 82.03.130(5). The appeal to the state board of tax appeals must be filed not later than fifteen days after the date of mailing of the certification.

[Statutory Authority: RCW 84.08.010, 84.08.070 and 84.48.075. 96-05-002, § 458-53-210, filed 2/8/96, effective 3/10/96. Statutory Authority: RCW 84.48.075. 84-14-039 (Order PT 84-2), § 458-53-210, filed 6/29/84; 79-11-029 (Order PT 79-3), § 458-53-210, filed 10/11/79. Formerly WAC 458-52-150.]

Chapter 458-57 WAC

STATE OF WASHINGTON ESTATE AND TRANSFER TAX REFORM ACT RULES

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

458-57-010 Scope of rules. [Statutory Authority: RCW 82.01.060, 83.36.005, and chapters 83.01 through 83.52 RCW. 80-03-048 (Order IT 80-1), § 458-57-010, filed 2/21/80.] Repealed by 83-17-033 (Order IT 83-2), filed 8/11/83. Statutory Authority: RCW 83.100.100. Later promulgation, see WAC 458-57-510.

458-57-020 Nature of inheritance tax. [Statutory Authority: RCW 82.01.060, 83.36.005, and chapters 83.01 through 83.52 RCW. 80-03-048 (Order IT 80-1), § 458-57-020, filed 2/21/80.] Repealed by 83-17-033 (Order IT 83-2), filed 8/11/83. Statutory Authority: RCW 83.100.100. Later promulgation, see WAC 458-57-520.

458-57-030 Property subject to inheritance tax. [Statutory Authority: RCW 82.01.060, 83.36.005, and chapters 83.01 through 83.52 RCW. 80-03-048 (Order IT 80-1), § 458-57-030, filed 2/21/80.] Repealed by 83-17-033 (Order IT 83-2), filed 8/11/83. Statutory Authority: RCW 83.100.100. Later promulgation, see WAC 458-57-530.

458-57-040 Jurisdiction—Domicile of decedent. [Statutory Authority: RCW 82.01.060, 83.36.005, and chapters 83.01 through 83.52 RCW. 80-03-048 (Order IT 80-1), § 458-

if one was filed. The final determination of the amount of taxes due from the estates that have filed federal returns is contingent on receipt of a copy of the final closing letter issued by the Internal Revenue Service (IRS). The department may require additional information to substantiate information provided by those estates that are not required to file federal returns. The release issued by the department will not bind or estop the department in the event of a misrepresentation of facts.

(3) **Amended returns.** An amended state return must be filed with the department within five days after any amended federal return is filed with the IRS and must be accompanied by a copy of the amended federal return.

(a) Any time that the amount of federal tax due is adjusted or when there is a final determination of the federal tax due the person responsible must give written notification to the department. This notification must include copies of any final examination report, any compromise agreement, the state tax closing letter, and any other available evidence of the final determination.

(b) If any amendment, adjustment or final determination results in additional state estate tax due, interest will be calculated on the additional tax due at the annual variable interest rate described in RCW 82.32.050(2).

(4) **Refunds.** Only the personal representative or the personal representative's retained counsel may make a claim for a refund of overpaid tax. If the application for refund, with supporting documents, is filed within four months after an adjustment or final determination of tax liability, the department shall pay interest until the date the refund is mailed. If the application for refund, with supporting documents, is filed after four months after the adjustment or final determination, the department shall pay interest only until the end of the four-month period. Any refund issued by the department will include interest at the existing statutory rate defined in RCW 82.32.050(2), computed from the date the overpayment was received by the department until the date it is mailed to the estate's representative. RCW 83.100.130(2).

[Statutory Authority: RCW 83.100.047 and 83.100.200. 06-07-051, § 458-57-045, filed 3/9/06, effective 4/9/06. Statutory Authority: RCW 83.100.200. 02-18-078, § 458-57-045, filed 8/30/02, effective 9/30/02; 00-19-012, § 458-57-045, filed 9/7/00, effective 10/8/00; 99-15-095, § 458-57-045, filed 7/21/99, effective 8/21/99.]

WAC 458-57-105 Nature of estate tax, definitions. (1) **Introduction.** This rule applies to deaths occurring on or after May 17, 2005, and describes the nature of Washington state's estate tax as it is imposed by chapter 83.100 RCW (Estate and Transfer Tax Act). It also defines terms that will be used throughout chapter 458-57 WAC (Washington Estate and Transfer Tax Reform Act rules). The estate tax rule on the nature of estate tax and definitions for deaths occurring on or before May 16, 2005, can be found in WAC 458-57-005.

(2) **Nature of Washington's estate tax.** The estate tax is neither a property tax nor an inheritance tax. It is a tax imposed on the transfer of the entire taxable estate and not upon any particular legacy, devise, or distributive share.

(a) **Relationship of Washington's estate tax to the federal estate tax.** The department administers the estate tax under the legislative enactment of chapter 83.100 RCW, which references the Internal Revenue Code (IRC) as it existed January 1, 2005. Federal estate tax law changes enacted after January 1, 2005, do not apply to the reporting requirements of Washington's estate tax. The department will follow federal Treasury Regulations section 20 (Estate tax regulations), in existence on January 1, 2005, to the extent they do not conflict with the provisions of chapter 83.100 RCW or 458-57 WAC. For deaths occurring January 1, 2009, and after, Washington has different estate tax reporting and filing requirements than the federal government. There will be estates that must file an estate tax return with the state of Washington, even though they are not required to file with the federal government. The Washington state estate and transfer tax return and the instructions for completing the return can be found on the department's web site at http://www.dor.wa.gov/ under the heading titled forms. The return and instructions can also be requested by calling the department's estate tax section at 360-570-3265, option 2.

(b) **Lifetime transfers.** Washington estate tax taxes lifetime transfers only to the extent included in the federal gross estate. The state of Washington does not have a gift tax.

(3) **Definitions.** The following terms and definitions are applicable throughout chapter 458-57 WAC:

(a) "Absentee distributee" means any person who is the beneficiary of a will or trust who has not been located;

(b) "Decedent" means a deceased individual;

(c) "Department" means the department of revenue, the director of that department, or any employee of the department exercising authority lawfully delegated to him by the director;

(d) "Escheat" of an estate means that whenever any person dies, whether a resident of this state or not, leaving property in an estate subject to the jurisdiction of this state and without being survived by any person entitled to that same property under the laws of this state, such estate property shall be designated escheat property and shall be subject to the provisions of RCW 11.08.140 through 11.08.300;

(e) "Federal return" means any tax return required by chapter 11 (Estate tax) of the Internal Revenue Code;

(f) "Federal tax" means tax under chapter 11 (Estate tax) of the Internal Revenue Code;

(g) "Federal taxable estate" means the taxable estate as determined under chapter 11 of the Internal Revenue Code without regard to:

(i) The termination of the federal estate tax under section 2210 of the IRC or any other provision of law; and

(ii) The deduction for state estate, inheritance, legacy, or succession taxes allowable under section 2058 of the IRC.

(h) "Gross estate" means "gross estate" as defined and used in section 2031 of the Internal Revenue Code;

(i) "Internal Revenue Code" or "IRC" means, for purposes of this chapter, the United States Internal Revenue Code of 1986, as amended or renumbered on January 1, 2005;

(j) "Person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, joint venture, syndicate, or other entity and, to the extent permitted by law, any federal, state, or other governmental unit or subdivision or agency, department, or instrumentality thereof;

(k) "Person required to file the federal return" means any person required to file a return required by chapter 11 of the

Internal Revenue Code, such as the personal representative (executor) of an estate;

(l) "Property," when used in reference to an estate tax transfer, means property included in the gross estate;

(m) "Resident" means a decedent who was domiciled in Washington at time of death;

(n) "State return" means the Washington estate tax return required by RCW 83.100.050;

(o) "Taxpayer" means a person upon whom tax is imposed under this chapter, including an estate or a person liable for tax under RCW 83.100.120;

(p) "Transfer" means "transfer" as used in section 2001 of the Internal Revenue Code. However, "transfer" does not include a qualified heir disposing of an interest in property qualifying for a deduction under RCW 83.100.046;

(q) "Washington taxable estate" means the "federal taxable estate":

(i) Less one million five hundred thousand dollars for decedents dying before January 1, 2006, or two million dollars for decedents dying on or after January 1, 2006;

(ii) Less the amount of any deduction allowed under RCW 83.100.046 as a farm deduction;

(iii) Less the amount of the Washington qualified terminable interest property (QTIP) election made under RCW 83.100.047;

(iv) Plus any amount deducted from the federal estate pursuant to IRC § 2056 (b)(7) (the federal QTIP election);

(v) Plus the value of any trust (or portion of a trust) of which the decedent was income beneficiary and for which a Washington QTIP election was previously made pursuant to RCW 83.100.047; and

(vi) Less any amount included in the federal taxable estate pursuant to IRC § 2044 (inclusion of amounts for which a federal QTIP election was previously made).

[Statutory Authority: RCW 83.100.047 and 83.100.200. 06-07-051, § 458-57-105, filed 3/9/06, effective 4/9/06.]

WAC 458-57-115 Valuation of property, property subject to estate tax, and how to calculate the tax. (1) **Introduction.** This rule applies to deaths occurring on or after May 17, 2005, and is intended to help taxpayers prepare their return and pay the correct amount of Washington state estate tax. It explains the necessary steps for determining the tax and provides examples of how the tax is calculated. The estate tax rule on valuation of property etc., for deaths occurring on or before May 16, 2005, can be found in WAC 458-57-015.

(2) **Determining the property subject to Washington's estate tax.**

(a) **General valuation information.** The value of every item of property in a decedent's gross estate is its date of death fair market value. However, the personal representative may elect to use the alternate valuation method under section 2032 of the Internal Revenue Code (IRC), and in that case the value is the fair market value at that date, including the adjustments prescribed in that section of the IRC. The valuation of certain farm property and closely held business property, properly made for federal estate tax purposes pursuant to an election authorized by section 2032A of the 2005 IRC, is binding on the estate for state estate tax purposes.

(b) **How is the gross estate determined?** The first step in determining the value of a decedent's Washington taxable estate is to determine the total value of the gross estate. The value of the gross estate includes the value of all the decedent's tangible and intangible property at the time of death. In addition, the gross estate may include property in which the decedent did not have an interest at the time of death. A decedent's gross estate for federal estate tax purposes may therefore be different from the same decedent's estate for local probate purposes. Sections 2031 through 2046 of the IRC provide a detailed explanation of how to determine the value of the gross estate.

(c) **Deductions from the gross estate.** The value of the federal taxable estate is determined by subtracting the authorized exemption and deductions from the value of the gross estate. Under various conditions and limitations, deductions are allowable for expenses, indebtedness, taxes, losses, charitable transfers, and transfers to a surviving spouse. While sections 2051 through 2056A of the IRC provide a detailed explanation of how to determine the value of the taxable estate the following areas are of special note:

(i) **Funeral expenses.**

(A) Washington is a community property state and under *Estate of Julius C. Lang v. Commissioner*, 97 Fed. 2d 867 (9th Cir. 1938) affirming the reasoning of *Wittwer v. Pemberton*, 188 Wash. 72, 76, 61 P.2d 993 (1936) funeral expenses reported for a married decedent must be halved. Administrative expenses are not a community debt and are reported at 100%.

(B) **Example.** John, a married man, died in 2005 with an estate valued at $2.5 million. On Schedule J of the federal estate tax return listed following as expenses:

SCHEDULE J - Funeral Expenses and Expenses Incurred in Administering Property Subject to Claims			
Item Number	Description	Expense Amount	Total Amount
1	**A. Funeral expenses:** Burial and services	$4,000	
	(1/2 community debt)	($2,000)	
	Total funeral expenses.		$2,000
	B. Administration expenses:		
	1. Executors' commissions - amount estimated/agreed upon paid. (Strike out the words that do not apply.).		$10,000
	2. Attorney fees - amount estimated/agreed upon/paid. (Strike out the words that do not apply.).		$5,000

The funeral expenses, as a community debt, were properly reported at 50% and the other administration expenses were properly reported at 100%.

(ii) **Mortgages and liens on real property.** Real property listed on Schedule A should be reported at its fair market value without deduction of mortgages or liens on the property. Mortgages and liens are reported and deducted using Schedule K.

(iii) **Washington qualified terminable interest property (QTIP) election.**

(A) A personal representative may choose to make a larger or smaller percentage or fractional QTIP election on the Washington return than taken on the federal return in order to reduce Washington estate liability while making full use of the federal unified credit.

(B) Section 2056 (b)(7) of the IRC states that a QTIP election is irrevocable once made. Section 2044 states that the value of any property for which a deduction was allowed under section 2056 (b)(7) must be included in the gross estate of the recipient. Similarly, a QTIP election made on the Washington return is irrevocable, and a surviving spouse who receives property for which a Washington QTIP election was made must include the value of the remaining property in his or her gross estate for Washington estate tax purposes. If the value of property for which a federal QTIP election was made is different, this value is not includible in the surviving spouse's gross estate for Washington estate tax purposes; instead, the value of property for which a Washington QTIP election was made is includible.

(C) The Washington QTIP election must adequately identify the assets, by schedule and item number, included as part of the election, either on the return or, if those assets have not been determined when the estate tax return is filed, on a statement to that effect, prepared when the assets are definitively identified. Identification of the assets is necessary when reviewing the surviving spouse's return, if a return is required to be filed. This statement may be filed with the department at that time or when the surviving spouse's estate tax return is filed.

(D) **Example.** A decedent dies in 2009 with a gross estate of $5 million. The decedent established a QTIP trust for the benefit of her surviving spouse in an amount to result in no federal estate tax. The federal unified credit is $3.5 million for the year 2009. In 2009 the Washington statutory deduction is $2 million. To pay no Washington estate tax the personal representative of the estate has the option of electing a larger percentage or fractional QTIP election resulting in the maximization of the individual federal unified credit and paying no tax for Washington purposes.

The federal estate tax return reflected the QTIP election with a percentage value to pay no federal estate tax. On the Washington return the personal representative elected QTIP treatment on a percentage basis in an amount so no Washington estate tax is due. Upon the surviving spouse's death the assets remaining in the Washington QTIP trust must be included in the surviving spouse's gross estate.

(iv) **Washington qualified domestic trust (QDOT) election.**

(A) A deduction is allowed for property passing to a surviving spouse who is not a U.S. citizen in a qualified domestic trust (a "QDOT"). An executor may elect to treat a trust as a QDOT on the Washington estate tax return even though no QDOT election is made with respect to the trust on the federal return; and also may forgo making an election on the Washington estate tax return to treat a trust as a QDOT even though a QDOT election is made with respect to the trust on the federal return. An election to treat a trust as a QDOT may not be made with respect to a specific portion of an entire trust that otherwise would qualify for the marital deduction, but if the trust is actually severed pursuant to authority granted in the governing instrument or under local law prior to the due date for the election, a QDOT election may be made for any one or more of the severed trusts.

(B) A QDOT election may be made on the Washington estate tax return with respect to property passing to the surviving spouse in a QDOT, and also with respect to property passing to the surviving spouse if the requirements of IRC section 2056 (d)(2)(B) are satisfied. Unless specifically stated otherwise herein, all provisions of sections 2056(d) and 2056A of the IRC, and the federal regulations promulgated thereunder, are applicable to a Washington QDOT election. Section 2056A(d) of the IRC states that a QDOT election is irrevocable once made. Similarly, a QDOT election made on the Washington estate tax return is irrevocable. For purposes of this subsection, a QDOT means, with respect to any decedent, a trust described in IRC section 2056A(a), provided, however, that if an election is made to treat a trust as a QDOT on the Washington estate tax return but no QDOT election is made with respect to the trust on the federal return:

(I) The trust must have at least one trustee that is an individual citizen of the United States resident in Washington state, or a corporation formed under the laws of the state of Washington, or a bank as defined in IRC section 581 that is authorized to transact business in, and is transacting business in, the state of Washington (the trustee required under this subsection is referred to herein as the "Washington Trustee");

(II) The Washington Trustee must have the right to withhold from any distribution from the trust (other than a distribution of income) the Washington QDOT tax imposed on such distribution;

(III) The trust must be maintained and administered under the laws of the state of Washington; and

(IV) The trust must meet the additional requirements intended to ensure the collection of the Washington QDOT tax set forth in (c)(iv)(D) of this subsection.

(C) The QDOT election must adequately identify the assets, by schedule and item number, included as part of the election, either on the return, or, if those assets have not been determined when the estate tax return is filed, or a statement to that effect, prepared when the assets are definitively identified. This statement may be filed with the department at that time or when the first taxable event with respect to the trust is reported to the department.

(D) In order to qualify as a QDOT, the following requirements regarding collection of the Washington QDOT tax must be satisfied.

(I) If a QDOT election is made to treat a trust as a QDOT on both the federal and Washington estate tax returns, the Washington QDOT election will be valid so long as the trust satisfies the statutory requirements of Treas. Reg. Section 20.2056A-2(d).

(II) If an election is made to treat a trust as a QDOT only on the Washington estate tax return, the following rules apply:

If the fair market value of the trust assets exceeds $2 million as of the date of the decedent's death, or, if applicable, the alternate valuation date, the trust must comply with Treas. Reg. Section 20.2056A-2 (d)(1)(i), except that: If the bank trustee alternative is used, the bank must be a bank that is authorized to transact business in, and is transacting business in, the state of Washington, or a bond or an irrevocable letter of credit meeting the requirements of Treas. Reg. Section 20.2056A-2 (d)(1)(i)(B) or (C) must be furnished to the department.

If the fair market value of the trust assets is $2 million or less as of the date of the decedent's death, or, if applicable, the alternate valuation date, the trust must comply with Treas. Reg. Section 20.2056A-2 (d)(1)(ii), except that not more than 35 percent of the fair market value of the trust may be comprised of real estate located outside of the state of Washington.

A taxpayer may request approval of an alternate plan or arrangement to assure the collection of the Washington QDOT tax. If such plan or arrangement is approved by the department, such plan or arrangement will be deemed to meet the requirements of this (c)(iv)(D).

(E) The Washington estate tax will be imposed on:

(I) Any distribution before the date of the death of the surviving spouse from a QDOT (except those distributions excepted by IRC section 2056A (b)(3)); and

(II) The value of the property remaining in the QDOT on the date of the death of the surviving spouse (or the spouse's deemed date of death under IRC section 2056A (b)(4)). The tax is computed using Table W. The tax is due on the date specified in IRC section 2056A (b)(5). The tax shall be reported to the department in a form containing the information that would be required to be included on federal Form 706-QDT with respect to the taxable event, and any other information requested by the department, and the computation of the Washington tax shall be made on a supplemental statement. If Form 706-QDT is required to be filed with the Internal Revenue Service with respect to a taxable event, a copy of such form shall be provided to the department. Neither the residence of the surviving spouse or other QDOT beneficiary nor the situs of the QDOT assets are relevant to the application of the Washington tax. In other words, if Washington state estate tax would have been imposed on property passing to a QDOT at the decedent's date of death but for the deduction allowed by this subsection (c)(iv)(E)(II), the Washington tax will apply to the QDOT at the time of a taxable event as set forth in this subsection (c)(iv)(E)(II) regardless of, for example, whether the distribution is made to a beneficiary who is not a resident of Washington, or whether the surviving spouse was a nonresident of Washington at the date of the surviving spouse's death.

(F) If the surviving spouse of the decedent becomes a citizen of the United States and complies with the requirements of section 2056A (b)(12) of the IRC, then the Washington tax will not apply to: Any distribution before the date of the death of the surviving spouse from a QDOT; or the value of the property remaining in the QDOT on the date of the death of the surviving spouse (or the spouse's deemed date of death under IRC section 2056A (b)(4)).

(d) **Washington taxable estate.** The estate tax is imposed on the "Washington taxable estate." The "Washington taxable estate" means the "federal taxable estate":

(i) Less one million five hundred thousand dollars for decedents dying before January 1, 2006, or two million dollars for decedents dying on or after January 1, 2006;

(ii) Less the amount of any deduction allowed under RCW 83.100.046 as a farm deduction;

(iii) Less the amount of the Washington qualified terminable interest property (QTIP) election made under RCW 83.100.047;

(iv) Plus any amount deducted from the federal estate pursuant to IRC § 2056 (b)(7) (the federal QTIP election);

(v) Plus the value of any trust (or portion of a trust) of which the decedent was income beneficiary and for which a Washington QTIP election was previously made pursuant to RCW 83.100.047; and

(vi) Less any amount included in the federal taxable estate pursuant to IRC § 2044 (inclusion of amounts for which a federal QTIP election was previously made).

(e) **Federal taxable estate.** The "federal taxable estate" means the taxable estate as determined under chapter 11 of the IRC without regard to:

(i) The termination of the federal estate tax under section 2210 of the IRC or any other provision of law; and

(ii) The deduction for state estate, inheritance, legacy, or succession taxes allowable under section 2058 of the IRC.

(3) **Calculation of Washington's estate tax.**

(a) The tax is calculated by applying Table W to the Washington taxable estate. See (d) of this subsection for the definition of "Washington taxable estate."

Table W

Washington Taxable Estate is at Least	But Less Than	The Amount of Tax Equals Initial Tax Amount	Plus Tax Rate %	Of Washington Taxable Estate Value Greater Than
$0	$1,000,000	$0	10.00%	$0
$1,000,000	$2,000,000	$100,000	14.00%	$1,000,000
$2000,000	$3,000,000	$240,000	15.00%	$2,000,000
$3,000,000	$4,000,000	$390,000	16.00%	$3,000,000
$4,000,000	$6,000,000	$550,000	17.00%	$4,000,000
$6,000,000	$7,000,000	$890,000	18.00%	$6,000,000
$7,000,000	$9,000,000	$1,070,000	18.50%	$7,000,000
$9,000,000		$1,440,000	19.00%	$9,000,000

(b) **Examples.**

(i) A widow dies on September 25, 2005, leaving a gross estate of $2.1 million. The estate had $100,000 in expenses deductible for federal estate tax purposes. Examples of allowable expenses include funeral expenses, indebtedness, property taxes, and charitable transfers. The Washington taxable estate equals $500,000.

Gross estate	$2,100,000
Less allowable expenses deduction	- $100,000
Less $1,500,000 statutory deduction	- $1,500,000
Washington taxable estate	$500,000

Based on Table W, the estate tax equals $50,000 ($500,000 x 10% Washington estate tax rate).

(ii) John dies on October 13, 2005, with an estate valued at $3 million. John left $1.5 million to his spouse, Jane, using the unlimited marital deduction. There is no Washington estate tax due on John's estate.

Gross estate	$3,000,000
Less unlimited marital deduction	- $1,500,000
Less $1,500,000 statutory deduction	- $1,500,000
Washington taxable estate	$0

Although Washington estate tax is not due, the estate is still required to file a Washington estate tax return along with a photocopy of the filed and signed federal return and all supporting documentation.

[Statutory Authority: RCW 83.100.047 and 83.100.200. 06-07-051, § 458-57-115, filed 3/9/06, effective 4/9/06.]

WAC 458-57-125 Apportionment of tax when there are out-of-state assets. (1) **Introduction.** This rule applies to deaths occurring on or after May 17, 2005, and discusses how to apportion the estate tax when there is out-of-state property included in the gross estate. The estate tax rule on apportionment of estate tax for deaths occurring on or before May 16, 2005, can be found in WAC 458-57-025.

(2) **Calculation of apportioned tax.** Apportionment is allowed for estate property located outside of Washington. The amount of tax is determined using Table W (see WAC 458-57-115) multiplied by a fraction. The numerator of the fraction is the value of the property located in Washington. The denominator of the fraction is the value of the decedent's gross estate. Property qualifying for the farm deduction is excluded from the numerator and denominator of the fraction. See WAC 458-57-155 (Farm deduction) for additional information on the farm deduction.

(3) **Example.** A widow dies in 2006 leaving a gross estate of $3.1 million. The estate had $100,000 in expenses deductible for federal estate tax purposes. The decedent also owned a home in Arizona valued at $300,000.

Gross estate	$3,100,000
Less allowable expenses deduction	- $100,000
Less $2,000,000 statutory deduction	- $2,000,000
Washington taxable estate	$1,000,000

Based on the tax table, the estate tax equals $100,000 ($1,000,000 x 10% Washington estate tax rate). Because the decedent owned an out-of-state asset, the tax due to Washington is prorated by multiplying the amount of tax owed by a fraction. The numerator of the fraction is the value of the property located in Washington divided by the denominator that equals the value of the decedent's gross estate. The fraction is then multiplied by the amount of tax.

($2,800,000 ($3,100,000 - $300,000) / $3,100,000) x $100,000 = $90,323

The estate does not have to pay estate tax to the state of Arizona in order to reduce the tax owed to Washington. The estate tax due to Washington is $90,323.

(4) **When is property located in Washington?** A decedent's estate may have either real property or tangible personal property located in Washington at the time of death.

(a) All real property physically situated in this state, with the exception of federal trust lands, and all interests in such property, are deemed "located in" Washington. Such interests include, but are not limited to:

(i) Leasehold interests;

(ii) Mineral interests;

(iii) The vendee's (but not the vendor's) interest in an executory contract for the purchase of real property;

(iv) Trusts (beneficial interest in trusts of realty); and

(v) Decedent's interest in jointly owned property (e.g., tenants in common, joint with right of survivorship).

(b) Tangible personal property of a nonresident decedent shall be deemed located in Washington only if:

(i) At the time of death the property is situated in Washington; and

(ii) It is present for a purpose other than transiting the state.

(c) **Example.** A nonresident decedent was a construction contractor doing business as a sole proprietor. The decedent was constructing a large building in Washington. At the time of death, any of the decedent's equipment that was located at the job site in Washington, such as tools, earthmovers, bulldozers, trucks, etc., would be deemed located in Washington for estate tax purposes. Also, the decedent had negotiated and signed a purchase contract for speculative property in another part of Washington. For estate tax purposes, that real property should also be considered a part of the decedent's estate located in Washington.

[Statutory Authority: RCW 83.100.047 and 83.100.200. 06-07-051, § 458-57-125, filed 3/9/06, effective 4/9/06.]

WAC 458-57-135 Washington estate tax return to be filed—Penalty for late filing—Interest on late payments—Waiver or cancellation of penalty—Application of payment. (1) **Introduction.** This rule applies to deaths occurring on or after May 17, 2005, and discusses the due date for filing of Washington's estate tax return and payment of the tax due. It explains that a penalty is imposed on the taxes due with the state return when the return is not filed on or before the due date, and that interest is imposed when the tax due is not paid by the due date. The rule also discusses the

NO. 64613-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In the Matter of the Estate of Barbara J. Nelson, Deceased. William C. Nelson; Brian S. Nelson and Janet McCann, Personal Representatives of the Estate of Nelson,, Petitioner, v. State of Washington, Department of Revenue, Respondent.	CERTIFICATE OF SERVICE

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I certify that I served a true and correct copy of the Brief of Respondent and this Certificate of Service, via Electronic Mail and U.S. Mail, postage prepaid, through Consolidated Mail Services, on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of July, 2010, at Tumwater, WA.

Kristin Jensen
KRISTIN D. JENSEN, Legal Assistant

ORIGINAL