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The Gross Estate And The Death Tax Credit

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The *Sherby* decision has also made an exception to the generally followed rule of respondeat superior,[91] basing its holding on parental tort immunity, a rule which bears a heavy burden of justification because of its wholesale denial of the right to suit to unemancipated children. The *Sherby* court disregarded the trend toward abrogation of the parental immunity doctrine, and the fact that the decision contravenes the positions taken by Professor Prosser, the *Restatement (Second) of Agency,* and the great majority of Amercian jurisdictions which have ruled on parental immunity/respondeat superior. To base a decision on an immunity from suit which appears to be so judicially eroded that its total abrogation is apparently coming in the foreseeable future, gives the *Sherby* decision a tenuous base, indeed. This base hardly seems sufficient to justify a denial of recovery to the injured child for injuries which would ordinarily be compensable, but for the family relationship.

STEWART MINOR HURTT

THE GROSS ESTATE AND THE DEATH TAX CREDIT

At a decedent's death his estate may be subject to two or more death taxes. Both the federal government[1] and all but one of the states[2] levy some form of death tax. To lessen the impact of these taxes, section 2011 of the Internal Revenue Code of 1954[3] provides a credit to decedent's estate for state death taxes actually paid. Due to the fact that many state death taxes vary considerably from the federal estate tax[4] some confusion has arisen as to exactly which state death taxes qualify for the credit allowed under section 2011.

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[91]A noted authority in the tort field states:

> No legal doctrine has been so generally criticized and yet so generally adhered to by the courts as the doctrine of *respondent superior.*

Smith, *Frolic and Detour,* 23 COL. L. REV. 444, 452 (1923).

[1]INT. REV. CODE of 1954, §§ 2001-2209. (General sections dealing with or concerning the federal estate tax.)

[2]Nevada is the only state which does not levy a death tax. *See* THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, TAX OVERLAPPING IN THE UNITED STATES 151 (1964) [hereinafter referred to as TAX OVERLAPPING].

[3]INT. REV. CODE of 1954, § 2011. This section provides in part:

> (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 Territory 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 decedent). (emphasis added).

[4]*See* Commonwelath v. Morris, 196 Va. 868, 86 S.E.2d 135 (1955). The court in *Morris* described the Virginia inheritance tax as follows:

> The tax imposed is a succession tax, laid upon the right to succeed

Recently the United States Court of Appeals for the Second Circuit, in *Second National Bank v. United States*,[5] refused to allow decedent's estate a credit against the federal estate tax for state death taxes paid on property that was not subject to tax as part of the federal estate.[6] The estate had sought a credit under section 2011 for state (Connecticut) death taxes paid with respect to a trust[7] established by the decedent, Frederick F. Brewster.[8] The trust assets were not included in the federal gross estate because decedent's reversionary interest in

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> to the property or to an interest therein as distinguished from an estate tax laid on the right to transmit property. 'An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits.'

Id. at 871, 86 S.E.2d at 137. *See generally* Karch, *The Appointment of Death Taxes*, 54 HARV. L. REV. 10 (1940).

[5]422 F.2d 40 (2d Cir. 1970). For a more complete statement of the facts involved in prior controversies (not relevant to this discussion) concerning the amount of federal estate taxes due from this estate, see Second Nat'l Bank v. United States, 222 F. Supp. 446 (D. Conn. 1963), *aff'd in part, rev'd in part*, 351 F.2d 489 (2d Cir. 1965), *aff'd*, 387 U.S. 456 (1967).

[6]The dissenting justice felt that there was nothing in section 2011(a) that either expressly or inferentially makes it a requirement of the state tax credit that the same property be taxed by the federal authorities, since, in his estimation, the statute contains no requirement that each item subjected to state death taxes be compared with those subjected to the federal tax in order to qualify for the credit. He was further concerned that the denial of the credit would involve a substantial loss of revenue to the state and give rise to a possible question of constitutionality and federal-state relations. 422 F.2d at 42 (dissenting opinion).

[7]*See* Second Nat'l Bank v. United States, 297 F. Supp. 1080 (D. Conn. 1969). The district court discussed the trust in great detail. Decendent made a transfer which was effective at his death on September 16, 1958 under an indenture of trust dated February 15, 1929 for the benefit of his son, John.

> This indenture gave John the income for life with the remainder to his sister and brothers or their issue, spouses, or appointees. Absent survival of any of this large class of beneficiaries, the trustees were directed to
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> > '. . . deliver and pay the entire remainder of the trust fund free from the trust herein created to the parties of the first part [the decedent and his wife], or if the parties of the first part shall not then both be living, to their survivor.'
>
> Thus, by the express terms of this indenture, the decedent had retained a reversionary interest, albeit one of limited value.

Id. at 1081.

[8]The State of Connecticut assessed the value of the trust assets at $931,031.70. and the tax attributable to such assets at $69,422.88. The estate was seeking a state death tax credit of the amount which was paid to the state by the estate. 422 F.2d at 41. This sum included the tax on the trust assets and an estate tax of $150,302.22. 297 F. Supp. at 1081. The Connecticut estate tax, in effect at Brewster's death, is the difference between the succession tax paid Connecticut and the maximum federal credit as determined by 201(b). *See* CONN. GEN. STAT. ANN. § 12-391 (Supp. 1970).

the corpus was less than 5 per cent at his death.[9] The Court of Appeals held that the credit allowable under section 2011(a) was restricted to property that was also included in the federal gross estate.[10]

The court, relying primarily on the legislative history,[11] determined that Congress enacted the tax credit to prevent the states from engaging in tax slashing competition in an attempt to lure the wealthy into states with lower death taxes. "This was to be accomplished by the means of a tax credit against the federal estate tax to avoid double taxation of estate assets."[12] The court reasoned that since ". . . there [was] no federal tax on the property, and only one state tax is imposed, there [could] hardly be any reason for the tax credit. . . ."[13] Furthermore, the court felt that this was the only interpretation consistent with the rationale of the federal estate tax,[14] that tax being an excise imposed on the shifting relationship of the property, as opposed to a levy on the property of which the estate is composed.[15] This determination was thought to be buttressed by the Treasury regulations,[16] which in the

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[9]INT. REV. CODE of 1954, § 2037. *See generally* R. STEPHENS AND G. MAXFIELD, THE FEDERAL ESTATE AND GIFT TAXES 75-85 (2nd ed. 1967), [hereinafter cited as STEPHENS AND MAXFIELD]. Connecticut in revising its tax laws has subsequently amended this sections to correspond with the federal act. *See* CONN. GEN. STAT. ANN. § 12-341(b) (Supp. 1970-71).

[10]422 F.2d at 40. This was a reversal of the district court which, after careful analysis of the legislative history, had held that decedent's estate was entitled to credit against the federal estate tax for state death taxes paid with respect to property of decedent even though such property was not included in decedent's federal gross estate for federal estate tax purposes. Second Nat'l Bank v. United States, 297 F. Supp. 1080 (D. Conn. 1969).

[11]The court relied on statements made by Representatives on the House floor during discussion of legislation concerning the death tax credit. These statements concerned tax slashing competition between the states and the avoidance of double taxation. *See* 67 CONG. REC. 3684 (1926); 67 CONG. REC. 695 (1925); II Rep. No. 1, 69th Cong. 1st Sess. 14, 1939-1 CUM. BULL. (Part 2) 315, 325.

[12]422 F.2d at 42.

[13]*Id.*

[14]*Id.* In a footnote, the Court of Appeals mentions the following cases which it felt supported the government's claim. Estate of Morsman, 14 B.T.A. 108 (1930); Anna Brock, 16 B.T.A. 1358 (1929); and Robert C. Moore, Jr., 21 B.T.A. 279 (1931). In *Morsman,* the Board of Tax Appeals held that the trust fund upon which the tax had been paid "did not constitute part of the gross estate for Federal estate-tax purposes" and disallowed a claimed credit for payment of a state transfer tax. This decision concerned the 25% credit of § 301(b) of the Revenue Act of 1924, which was the predecessor of the present 80% death tax credit. The amount involved was only $131.71 which was insignificant to the total credit sought. The *Brock* court never really discussed the issue and in *Moore,* which relied on both *Morsman* and *Brock,* the credit issue was not decided on its merits because there was no proof that taxpayer had actually paid taxes to the state with respect to the property in question.

[15]*See* United States Trust Co. v. Helvering, 307 U.S. 57 (1939).

[16]The Treasury Regulations promulgated concerning this section are as follows: Treas. Reg. § 20.2011-1(a) (1954); Treas. Reg. 105 (1939 Code) Sec. 81.1; Treas. Reg. 80 (1937 ed.) Art. 9(b); Treas. Reg. 80 (1934 ed.) Art. 9(b); Treas. Reg. 70 (1929 ed.)

court's opinion, have consistently referred to the words "gross estate" in the context of "gross estate for federal tax purposes" with no express disapproval by Congress.[17]

The predecessor[18] to the present credit was first enacted in 1924 and under it a 25 per cent credit was allowed for state death taxes. This credit was enacted during a period when there was a general desire on the part of many[19] that the federal government vacate this area of taxation inasmuch as it was a traditional source of revenue to the states.[20] However, due to the action of same states,[21] it became apparent that if this matter were left solely to the states, competition would arise among the several states to revoke or lower their death taxes in an attempt to lure wealthy elders into those states with lower or non-existent

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Art. 9(a); Treas. Reg. 68 (1924 ed.) Art. 9(a). Treas. Reg. 105 (1939 Code) Sec. 81.1 is representative of the prior regulations:

> The credit is limited to the amount of the estate, inheritance, legacy, or succession taxes paid to any State, Territory, possession of the United States, or the District of Columbia in respect of property included in the gross estate of the decedent for Federal estate tax purposes.

Contra, Treas. Reg. § 20.2011-1(a). T.D. 6526, 1961-1 CUM. BULL. 402.

[17]*See* Mitchell v. Commissioner, 300 F.2d 533, 538 (4th Cir. 1962). The Court in *Mitchell* discussed the effect of Congressional re-enactment on Treasury Regulations. The court felt that this was important but that if such regulations were found to be contrary to historical intent they need not be followed.

[18]Act of June 2, 1924, ch. 234, § 301, 43 Stat. 253.

[19]67 CONG. REC. 522 (1925) (remarks of Representative Green). When introducing the 1926 Revenue Bill, Representative Green stated:

> A claim had been set up, and a claim which I must say was not without considerable foundation, that the States needed this revenue, and that the Federal Government had appropriated to itself so much of the sources of taxation the States were unable to find the funds necessary to carry on their legitimate and proper functions. So there arose an effort, largely assisted by propaganda—I do not mean at this time improperly—in favor of the abolition of the Federal inheritance tax in order, as it was claimed, that the States might make use of this means of raising revenue. But there also had arisen in the meantime one great obstacle to this plan, considered independently of its merits.

Id.

[20]1924 SEC. TREAS. REP. 11-12. According to the secretary, states had occupied the death tax field long before the intrusion by the Federal Government. *See also* J. MAXWELL, TAX CREDITS AND INTERGOVERNMENTAL FISCAL RELATIONS 19-20 (1962) [hereinafter cited as MAXWELL].

[21]For example:

> Florida in 1924, by constitutional amendment, forbade enactment of death taxes by its legislature. By supplementing the attractions of its climate with the attractions of a taxhaven, Florida hoped that rich people would domicile themselves within its borders. Nevada took the same step, with the same hope, in 1925.

MAXWELL at 21.

death tax burdens.[22] As a result of these factors, Congress in 1926[23] raised the tax credit from 25 per cent to its present level of 80 per cent. It was generally anticipated that under the higher credit the states would be able to use their various death taxes as a source of revenue without danger of competition from states with lower death tax burdens.[24] It was also contemplated that through the use of this higher credit the overall federal tax burden would be reduced, an objective of the federal tax policy in the 1920's.[25] Congress also hoped that the increased credit would engender some uniformity in the state taxes,[26] but this

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[22]67 CONG. REC. 522 (1925) (remarks of Representative Green). Representative Green stated concerning the abolition of the estate tax in Florida:

> The State of Florida had adopted a provision in its constitution forbidding the levying of either inheritance or income taxes. The object of this provision was plain. The purpose and intent of it was to draw from other States people of wealth who would, by bringing within its boundaries such of their personal property as might be subject to tax, and with the investments they might there make greatly increase the wealth of that community. The example of Florida, and its apparent success, because it did succeed in drawing qutie a number of men of wealth within its boundaries, had its influence upon other States, and it was soon apparent that not alone [sic] Florida but the whole country would be plunged into a competition between the various States as to which could offer the most favorable inducements to men of wealth to settle within their boundaries.

Id.

[23]Act of Feb. 26, 1926, ch. 27, § 301(b), 44 Stat. 2007.

[24]*See generally* II Rep. No. 1, 69th Cong., 1st Sess. 14, 1939-1 CUM. BULL. (part 2) 315. This report prepared by the House Committee of Ways and Means concerning the Revenue Act of 1926 stated:

> Under the present law [Revenue Act of 1924] a credit is allowed upon these [Federal estate] taxes of the amount of any inheritance or estate tax paid to any State, up to 25 per cent of the Federal tax. In order to give the various States full freedom to make use of this tax, the committee decided to extend the credit which might be so allowed up to 80 per cent of the Federal tax. The several States. by the use of this provision, will be enabled to make use of the inheritance tax without additional cost to its citizens.

Id. at 325.

[25]*See* ADVISORY COMMISSION ON INTERGOVERMENTAL RELATION, COORDINATION OF STATE AND FEDERAL INHERITANCE, ESTATE, AND GIFT TAXES 28 (1961) [herinafter cited as ADVISORY COMMISSION REPORT].

[26]*See* 67 CONG. REC. 966 (1925) (remarks of Representative Burtness). Representative Burtness stated during debate over the estate tax credit that:

> By adopting 50 per cent [credit] instead of 80 [per cent] you will leave the same incentive that the committee had in mind—the incentive to get States to pass more or less uniform inheritance tax laws with a view of getting a full benefit of such credit as may be provided in the law.

Id.

objective was hindered because uniformity was not made a condition of eligibility for the credit.[27]

States reacted to this increased credit in various ways. Those states that had abolished their death taxes enacted some form of tax in order to take advantage of the credit.[28] Some states adopted death tax statutes based on the federal estate tax;[29] others raised their present taxes in order to gain maximum advantage under the credit.[30] The majority of states, in an attempt to procure full advantage of the credit, enacted "pick-up" statutes.[31] These statutes vary from state to state, but most assure the state the maximum amount of credit by absorbing or "picking-up" the difference between the state tax on a decedent's estate and the maximum credit allowed against the federal levy.[32]

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[27]*See* Act of Feb. 26, 1926, ch. 27, § 301(b), 44 Stat. 2007. See also ADISORY COMMISSION REPORT at 11.

[28]Florida and Alabama enacted death tax legislation to take advantage of the tax credit. Only Nevada has refrained from such legislation. *See* TAX OVERLAPPING at 151.

[29]New York and Mississippi adopted estate type taxes. *See* Perkins, *State Action Under the Federal Estate Tax Credit Clause,* 13 N.C.L. REV. 271, 281 (1935).

[30]Georgia, Kentucky, Massachusetts, New Jersey, New York, Rhode Island and Virginia increased their inheritance tax rates apparently to take advantage of the credit. *Id.* at 280 n.32.

[31]*See* TAX OVERLAPPING at 151-152. The commission found that the taxes used by the various states are as follows:

> In general outline, these taxes fall into several categories. The simplest are the five estate taxes patterned after the Federal statute and designed to impose a tax liability equal to the maximum credit allowed against the Federal tax. Some of these so-called "pickup" taxes, originally intended to preempt for the States the exact amount of the credit, have departed from this pattern; they have been overlaid with provisions at variance with those of the Internal Revenue Code. . . .
>
> Four states use estate taxes and 35 (including the District of Columbia) use inheritance taxes, supplementing each with a "pick-up" statute to absorb any unused credit; 2 use only inheritance taxes and 2 only estate taxes, but each of these employs tax rates substantially in excess of maximum credit, obviating the need for "pick-up" taxes; 1 State employs all three: An inheritance tax, and estate tax, and a "pickup" tax, 1 an estate tax and an inheritance tax but no "pickup" tax, while still another employs none of them.
>
> There are important variations in virtually every structural feature of the States' taxes—in definitions of the gross tax base, in deductions and exemptions as well as in rates and payment provisions.... Rates are generally graduated, but some States employ flat rates, differentiating between two or more classes of relationships of the heir to the decedent. The variety literally defies summation.

Id.

[32]"Pick-up" statutes are those enacted to insure that the state gets full advantage of the maximum federal death tax credit. Many such statutes are enacted so that the

The "pick-up" tax is one of the reasons that at present there is such a disparity among the various state tax structures. State legislators, relying on the "pick-up" taxes to absorb losses of revenue due to reductions in the state inheritance or succession taxes, have felt free to bow to pressure for changes or relief provisions in such taxes.[33] The capacity of the original act to achieve federal-state tax coordination has been further undermined by subsequent legislative developments such as increasing federal revenue through a supplementary estate tax against which no credit was allowable for death taxes paid to states.[34] Those states desiring more revenue have had to seek it through levies in excess of the maximum allowable credit.[35] Further adding to the death tax heterogeneity are those states which originally enacted estate taxes based on the federal estate tax, but have subsequently departed from this pattern.[36]

Under section 2011(a), and its predecessors, it has been a relatively simple matter to determine whether or not state death taxes qualified for the state death tax credit.[37] There are only two distinct limitations inherent in the statute. The first limitation is that the credit would be

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difference between the amount of the state inheritance and the maximum Federal credit is automatically added to the total state taxes due. *See, e.g.*, CONN. GEN. STAT. ANN. § 12-391 (Supp. 1970); VA. CODE ANN. § 58-162 (1969 Repl. Vol.)

[33]*See* TAX OVERLAPPING at 151.

[34]*See* INT. REV. CODE of 1954, §§ 2001, 2011(b), (d).*See also Hearing on S. 2483 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 91st Cong., 1st Sess., 92-93 (1969). William G. Colman, the Executive Director of the Advisory Commission, in a prepared statement noted that:

> The capacity of the original 1926 tax credit (80 per cent of the 1926 Federal liability) to achieve Federal-State tax coordination has been undermined by Federal legislative developments. On several occasions during the succeding fifteen years, Federal estate tax rates were increased and exemptions reduced in order to increase Federal revenues. This was accomplished by enacting the increases in the form of separate estate tax against which no credit was allowed for taxes paid to States. Thus, as previously noted, the Federal tax credit for State death tax payments now accounts for only 10 per cent of the Federal liability. At the present time, States are extremely reluctant to change their death tax policies because of the vulnerability to interstate tax competition.

Id. at 93.

[35]*Cf.* ADVISORY COMMISSION REPORT at 45-36.

[36]*See* TAX OVERLAPPING at 151.

[37]UNITED STATES TAX FORM 706 provides instructions, a table, and an example to aid the taxpayer in claiming the § 2011 credit. The present form merely requires that the tax payer consult Table B and insert the proper figure in blank No. 2 in order to compute the net estate tax payable. There is no requirement that the taxpayer list or explain on what property the state death taxes were levied—only the amount paid must be certified.

ineffective if the estate incurred no federal estate tax.[38] Secondly, the credit will be ineffective for state death tax levies in excess of the 80 per cent maximum limitation.[39]

It is evident that under these somewhat simple limitations it would be an easy matter to correlate the differences between the federal estate tax and the various state death taxes.[40] Specifically, in areas of diversity, such as in the taxation of annuities[41] or of jointly owned property with the right of survivorship,[42] states that tax these assets differently than they are taxed under the federal estate laws would nevertheless receive credit revenues under the original two limitations.

The Court of Appeals in *Second National Bank* has imposed an additional limitation to those previously mentioned. This third limitation, stated simply, is that the credit is ineffective where the specific property taxed by the state has *not* been included in the federal gross estate. The third limitation is the result of seemnigly mistaken emphasis placed by the court on the avoidance of double taxation.[43] Under the preferable interpretation of the legislative intent, it would make no difference as far as the death tax credit is concerned whether or not the Brewster trust property was included in the Federal gross estate.[44] Congress was concerned with more than just preventing double

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[38]Due to the relatively high exemptions under the federal estate tax statutes states have levied death taxes on smaller estates which are exempt under federal law. Therefore these levies do not qualify for the state death tax credit. *Compare* INT. REV. CODE of 1954, § 2052 *with* CAL. REV. & TAX. CODE, § 13801 (West 1970); N.Y. TAX LAW, § 249-q (McKinney 1966). *See* MAXWELL at 25; ADVISORY COMMISSION REPORT at 37-38.

[39]*See* INT. REV. CODE of 1954, § 2011(b).

[40]*Cf.*, INT. REV. CODE of 1954, § 2011(a). *See also* note 37 *supra.*

[41]*Compare* INT. REV. CODE of 1954, § 2039 *with* VA. CODE ANN. §§ 58-152 to -162 (1969 repl. vol.) (there is no express provision covering annuities under the Virginia statute) *and* OHIO REV. CODE ANN. § 5731.09(A) and (B) (Baldwin Supp. 1970).

[42]*Compare* INT. REV. CODE of 1954, § 2040 *with* CONN. GEN. STAT. ANN., § 12-343 (1958) *and* OHIO REV. CODE ANN. § 5731.10(B) (Baldwin Supp. 1969).

[43]*See* 422 F.2d 40. The Court of Appeals discussing the effect of the tax credit sought on the trust property stated:

> When, as here, there is no federal tax on the property, and only one State tax is imposed, there can hardly be any reason for the tax credit, *which was designed to avoid the burden of double taxation.* (exphasis added)

Id. at 42.

[44]Under the original two limitations inherent in § 2011 the trust property would clearly qualify for the state death tax credit. Text accompanying notes 38-39 *supra.* Also, by allowing the state a credit on the trust property, Connecticut was able to use its historic form of death tax as a source of revenue. Note 24 *supra;* text accompanying notes 45 and 46 *infra.*

taxation—the credit was intended to reduce the overall tax burden[45] on the estate while at the time time allowing the states full use of their various death taxes as a source of revenue free from tax-slashing competition.[46] Under this third limitation the State of Connecticut stands to lose considerable revenue[47] and in order to make sure that such loss does not recur it will have to modify its estate or succession tax laws.[48]

Likewise, the Treasury regulations[49] relied on by the court were in conflict with the design of the section as revealed by its structure and legislative history.[50] The court was not entirely accurate in its statement that these regulations have been consistent for more than forty years. In its most recent regulation the Treasury did not speak of the gross estate in the context of the federal gross estate.[51] The court would have

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[45]See 67 CONG. REC. 4429 (1926) (remarks of Representative Mills). During debate over the State Death Tax Credit Representative Mills stated:

> [T]he greater tax the State takes, the less ability the individual estate has to pay the Federal Tax.
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> [This] is the basis of the 80 per cent rebate. It is an honest and sincere attempt to base a Federal tax rate on the ability of the individual estates throughout the United States to pay a Federal tax, and their ability in turn is dependent on the tax they have to pay the States.
>
> In addition, it insures throughout the United States uniformity of taxation if you take the really important factor into consideration, that of total taxes combined, State and local.

Id.

[46]Note 22 *supra.*

[47]As a result of the denial of the credit to the taxpayer on the trust property, the estate subsequently brought an action against the State of Connecticut for a refund of the Connecticut estate tax paid in the amount of the sum denied as a credit by the IRS. If taxpayer is successful in this action it may cost the state as much at $69,422.88, the amount of the Connecticut succession tax on the trust property. Notes 9 and 10 *supra.*

[48]It may make a difference what type of pick-up statute is used by the state. For example, in *Second Nat'l Bank* the taxpayer paid to the State of Connecticut the full amount of succession tax, $950,683.55, which included the tax on the trust property, and the entire Connecticut "pick-up" tax of $150,303.22. 297 F. Supp. at 1081. *See* CONN. GEN. STAT. ANN. § 12-391 (Supp. 1970). This section is designed to absorb the difference between the succession tax and the maximum credit. As a result of *Second Nat'l Bank* credit is disallowed on the trust assets resulting in a loss of revenue to the state of $69,422.88 (the amount of the succession taxes attributable to the trusts assets). If a pure "pick-up" type tax had been imposed the entire 80 per cent credit would have been allowable. Under such statutes exactly 80 per cent of whatever the federal tax may be. Notes 31 and 32 *supra.* Possibly, if the trust property had not been taxed under the Connecticut succession tax, the estate tax would have absorbed the maximum credit allowable.

[49]Note 16 *supra.*

[50]Text accompanying notes 24-26 *supra.*

[51]Treas. Reg. § 20.2011-1(a) (1954), T.D. 6526, 1961-1 CUM. BULL. 402 provides as follows:

> (a) IN GENERAL. A credit is allowed under section 2011 against the Federal estate tax for estate, inheritance, legacy or succession

been correct in disregarding the regulations as an attempt to add to the statute something which is not there.[52]

Moreover, it is highly probably that this third limitation will affect the death tax credit on other property taxed by the state but expressly excluded from the federal gross estate.[53] Most states include in the gross estate, as does section 2039 of the Internal Revenue Code,[54] the value of any annuity receivable by the beneficiary by reason of surviving the decedent. However, not all states provide exclusions for those portions of the annuity that are not attributable to contributions by decedent or his employer or exclusions for annuities from an employer's qualified trust or pension plan as is provided by the Internal Revenue Code.[55] Clearly under the third limitation state taxes on such annuities excluded from the federal estate would not qualify for the state death tax credit.[56]

> taxes actually paid to any State, Territory, or the District of Columbia, or, in the case of decedents dying before September 3, 1958, any possession of the United States (herein after referred to as "State death taxes"). The credit, however, is allowed only for State death taxes paid (1) with respect to property included in the decedent's gross estate, and (2) with respect to the decedent's estate. The amount of the credit is subject to the limitation described in paragraph (b) of this section. It is subject to further limitations described in Section 20.2011-2 if a deduction is allowed under Section 2053(d) for State death taxes paid with respect to a charitable gift. See paragraph (a) of Section 20.2014-1 as to allowance of a credit for death taxes paid to a possession of the United States in a case where the decedent died after September 2, 1958.

In other regulations concerning credits against the federal estate tax, the regulations expressly refer to gross estate for Federal estate tax purposes. *See, e.g.*, Treas. Reg. § 20.2014-2 (credit for foreign death taxes).

[52]*Cf.* United States v. Calamaro, 354 U.S. 351 (1957). The court stated in *Calamaro* that: "... we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the regulation can furnish no sustenance to the statute." *Id.* at 359. *See generally* Brown, *Regulations, Reenactment and The Revenue Acts*, 54 HARV. L. REV. 377 (1941). According to Mr. Brown there is nothing sacred in Treasury regulations or other administrative rulings. "They are simply aids—often very helpful and of great weight, and sometimes even decisive—in interpretation of the statutes; but they are inherently no more binding than other devices that may be available." *Id.* at 378. *See also* Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 400 (1941). Dean Griswold proposes that the reenactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute. *But see Feller, Addendum to the Regulations Problem*, 54 HARV. L. REV. 1311 (1941).

[53]Text accompanying notes 54-62 *infra*.

[54]INT. REV. CODE of 1954, § 2039. *See generally* STEPHENS and MAXFIELD at 96-100.

[55]*See, e.g.*, OHIO REV. CODE ANN. § 5731.09(A) & (B) (Baldwin Supp. 1970).

[56]In Connecticut, provisions similar to INT. REV. CODE of 1954 § 2039(c)(1) & (2) did not become part of the succession tax law until 1961. This meant that prior to 1961 such economic benefits from decedent's annuity were taxed by Connecticut

Further, some states[57] tax jointly-owned property as if it were equally owned by all joint owners and the decedent's interest is taxed as his fractional share thereof. This is distinctly different from the federal approach under which section 2040 of the Internal Revenue Code directs the inclusion of jointly owned property in the value of the gross estate except for such part as was not originally owned by decedent and was not received by the decedent from another joint owner at less than adequate consideration.[58] Consequently, those states might attribute property to decedent's estate under the fractional share rule that would be excluded from the federal estate, thus resulting in a denial of credit under the third limitation.[59]

If the reasoning of the Court of Appeals is extended to its reason-

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at full value because there was a shifting of economic benefit at death with no exclusions. *See* Dolak v. Sullivan, 145 Conn. 497, 144 A.2d 312; Borchard v. Connelly, 140 Conn. 491, 101 A.2d 497 (1953). *See also* Savage, *The Proposed Virginia Estate Tax*, 44 VA. L. REV. 1009 (1958). Mr. Savage states that:

> ... [T]here is no express provision in the Virginia statute covering annuities.... However, the Department of Taxation assesses inheritance tax on an annuity, either on the theory that it is a grant or gift intended to take effect at death, or that it is a retained life interest. Although it is not the practice of the Department to tax payments under certain non-contributory and nondesignatory pensions and profit sharing plans, the indefiniteness of the present law is most unsatisfactory.

Id. at 1021. *Cf.* N.Y. TAX LAW § 249r-3(b) (McKinney 1966).

[57]*See, e.g.*, CONN. GEN. STAT. ANN. § 12-343 (1958); OHIO REV. CODE ANN. § 5731.10(B) (Baldwin Supp. 1969) Refer to discussion of these differences, note 59, *infra*.

[58]*Compare* INT. REV. CODE of 1954, § 2040, *with* CONN. GEN. STAT. ANN. and OHIO REV. CODE ANN. § 5731.10(B) (Baldwin Supp. 1969), § 12-343 (1958). ?. *See generally* STEPHENS and MAXFIELD, at 108-117.

[59]*See* CONN. GEN. STAT. ANN., § 12-343 (1958). Under the Connecticut succession tax, jointly owned property with the right of survivorship is treated as if owned equally by all joint owners and the decedent's interest is taxed as his fractional part. Comment, *The Federal Estate Tax and the Connecticut Succession Tax—A Survey of Their Differences*, 36 CONN. BAR. J. 630 (1962) gives the following example showing how the Connecticut tax differs from the federal tax in this area:

> A & B are joint tenants with rights of survivorship. A contributed the whole cost of $50,000. The land is now worth $200,000. Under the Code, if A dies first, the wholes $200,000 is included in his gross estate. If B dies first, nothing is included in his gross estate. Under the succession tax, if A dies first, $100,000 is included in his gross estate. If B dies first, $100,000 is included in his gross estate.

Id. at 632. It is apparent that under the third limitation, if B dies first, B would not be entitled to a § 2011 credit because his interest was not included in the federal gross estate. *See also*, OHIO REV. CODE ANN. § 5731.10(B) (Baldwin Supp. 1969). (In Ohio if the joint tenant owners are husband and wife, only ½ the value of the property is includable in the gross estate). *But see* CAL. REV. & TAX CODE, § 13671 (West 1970); N. Y. TAX LAW, § 249-r(5) (McKinney 1966); VA. CODE ANN. § 58-152(5) (1969 Repl. Vol.).

able and logical conclusion, the third limitation may result in a denial of the death tax credit on property taxed by the state but not taxed on the federal return due to a specific deduction or exemption in the federal estate tax law.[60] Such property for which specific exemptions and deductions are allowable is considered to be a part of the federal gross estate whereas property excluded by the Code is not considered part of the gross estate.[61] The federal marital deduction will serve as a good example of this extremity.[62] The majority of states do not allow a deduction as does section 2056 of the Internal Revenue Code for certain bequests to the surviving spouse.[63] As a result the state would in effect be taxing property on which there is no tax levy on the federal return. Ostensibly, if the purpose of the credit is, as decided by the Court of Appeals, to prevent double taxation, then a credit on such property is not necessary because only the state is taxing the bequest to the surviving spouse.[64]

A further area in which the requirements of the third limitation may result in the disallowance of a credit is that of evaluation of decedent's property. Under section 2032 of the Internal Revenue Code,[65] the executor may elect to have the value determined a year after death,

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[60]*See* Reply Brief for the Appellant at 4, Second Nta'l Bank v. United States, 422 F.2d 40 (2d Cir. 1970). According to the government,

> [T]he crucial question is whether a property interest is included in the gross estate and is taken into account in computing the federal estate tax. It is not a question of the *amount* of total tax; it is whether the *source* of the tax payable is found—through the determination of the federal gross estate—in the property interest in question.

[61]*Id. Compare* INT. REV. CODE of 1954, §§ 2054, 2056, *with* INT. REV. CODE of 1954, § 2039.

[62]INT. REV. CODE of 1954, § 2056. *See generally* STEPHENS and MAXFIELD at 191-236.

[63]*See, e.g.,* OHIO REV. CODE ANN. § 5731.09(A) (Baldwin Supp. 1969). In Ohio the only thing similar to the marital deduction under the federal estate law is a $10,000 family exemption. *See also* Korn, *The Impact of State Laws on the Marital Deduction,* 47 TAXES 289 (1969). According to Mr. Korn:

> Some state death tax laws allow for a marital deduction in the same vein as the federal law. When this situation arises, savings in state estate taxes may be as important as those savings that can be effected for Federal estate tax purposes. Unfortunately, only ten states, Alabama, Arizona, Arkansas, California, Florida, Georgia, New York, North Carolina, North Dakota, and South Carolina, will allow marital deduction for State death tax purposes.

Id. at 293.

[64]Another deduction allowed on the federal return but not allowed by many states is the deduction for losses incurred during the settlement of the estate, arising from fire, storm, theft or other casualties when not covered by insurance. INT. REV. CODE of 1954, § 2054. *See generally* STEPHENS and MAXFIELD at 176-179. States that do not allow such a deduction but instead tax the property at its full value may under the third limitation be denied a credit on this amount.

[65]INT. REV. CODE of 1954, § 2032. *See generally* STEPHENS and MAXFIELD at 42-48.

or at the date of sale or distribution if the property within the gross estate is sold or distributed within that year. Several states require that the valuation of the gross estate for succession tax purposes be made as of the date of death.[66] If property becomes worthless during the year allowed on the federal return no estate tax will be levied with respect to it. However, in a state requiring the property to be evaluated at decedent's death the property may be of sufficient value for a state death tax to be levied on it. Logically, under the third limitation a credit would be denied with respect to such property.[67]

Despite all of the aforementioned ramifications, the decision of the Court of Appeals may well be beneficial in the long run since it should focus the attention of the states on conforming their death tax laws to the federal structure in order to obtain the maximum advantage under the credit. Naturally, with the great diversity in estate tax laws there is a great increase in expense due to the duplication of collection and administrative efforts on the part of federal, state, and local governments.[68] The individual taxpayer is also burdened by having to deal with two or more complex death tax concepts.

The court by imposing this third limitation has exceeded the original motives of Congress as far as the credit is concerned, but after

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[66]*See, e.g.*, CAL. REV. & TAX CODE, § 13951 (West 1970); N.Y. TAX LAW, § 249-r (McKinney 1966); VA. CODE ANN. § 58-155 (1969 Repl. Vol.). Each of these states permits valuation as of date of death only.

[67]There are many other areas where federal and state laws may differ, resulting in a loss of credit, such as in the area of transfers in contemplation of death and deduction for funeral expense. Under the Code gifts made three years prior to death are conclusively presumed not to be in contemplation of death and are not included in decedent's gross estate. INT. REV. CODE of 1954, § 2035. *See generally* STEPHENS and MAXFIELD at 55-64. But in Connecticut, for example, the tax commissioner is given the use of only a one year rebuttable presumption that a transfer was made in contemplation of death. CONN. GEN. STAT. ANN. § 12-341(c) (1958). However, a Connecticut Superior Court has held that a gift made five years before the death of the donor was included in decedent's estate as a transfer made in contemplation of death. Knapes v. Walsh, 16 Conn. Supp. 240 (1949). In *Knapes*, decedent (72 years old) just prior to a major operation had his bank account changed into the names of plaintiff and himself. The plaintiff from that point forward had the checkbook in her control until decedent died almost five years later. The transfer was taxed in full as a transfer in contemplation of death. Under the third limitation a credit might be denied even though the estate paid a state death tax on the transfer, because under federal estate tax law the gift was conclusively presumed not to have been in contemplation of death. *See also* Savage, *The Proposed Virginia Estate Tax*, 44 VA. L. REV. 1009, 1023 (1958). Under the Virginia inheritance tax law no provision is made for deduction for debts, funeral expenses, cost of administration or taxes. INT. REV. CODE of 1954, § 2053, allows a deduction from the gross estate for such expenses. Thus, Virginia would levy a tax with respect to expenses deducted from the federal gross estate.

[68]*See* MAXWELL at 34; ADVISORY COMMISSION REPORT at 14.

forty or more years of use it is clear that some action must be taken towards estate tax uniformity. To insure that the maximum credit is obtained under the third limitation a few states may be induced to conform their death taxes to the federal estate system but it will take action by Congress[69] to bring about the necessary uniformity in the death tax area.[70]

JAMES M. TURNER, JR.

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[69]*See Hearings on S. 2483 Before the Subcom. on Intergovernmental Relations of the Senate Comm. on Gov't. Operations*, 91st Congress, 1st Sess., 92 (1969). Mr. Wm. G. Colman, Executive Director, Advisory Commission on Intergovernmental Relations, made the following recommendations:

> [P]roviding for an alternative Federal credit for State estate tax payments equivalent to 80 percent of the Federal tax liability on the first $150 thousand of the taxable estate; 20 percent of the tax liability on the balance of the taxable estate. Based on the latest available statistics, this two-bracket tax credit paid to the States, when fully operative, would approximate a uniform 40 percent credit against the gross tax liability of all taxable estates....
>
> This two-racket [sic] approach would also contribute significantly to the stability of State revenues because small and middle-sized estates are the hard core of their tax base. By the same token, it would increase the relative shares of the small, less industrial States without affecting high-wealth States excessively.
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> The Advisory Commission further recommended that the more liberal alternative credit for death taxes paid to States be made available only to those States that:
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> a. Enact an estate tax in order to ease taxpayer compliance and tax administrative burdens; and
>
> b. Revise upward their estate tax rates to 'pick-up' the increase in the Federal tax credits for State death tax payments.
>
> S. 2483 would implement this *quid pro quo* approach making the enlarged Federal credit contingent on State adoption of the Federal estate-type levy....

Id. at 92-93.

[70]Miller, *Federal Courts as Makers of Income Tax Law*, 6 TAX L. REV. 151 (1951). Mr. Miller stated the following:

> To say that judges ought not to legislate at all in the tax field would be clearly wrong. Congress often uses words—"income," for instance—which have several meanings, or otherwise enacts ambiguous tax provisions. Certainly, when the facts in a litigated case involve a twilight zone of this nature, it is the duty of the court to take a definite position so far as the facts of that case require, and the position which the court takes will inevitably have an effect on future applications of the provision in cases involving similar facts. To that extent the courts do legislate and must legislate in the taxation field, and the incidental frustration which taxpayers suffer from this necessary court legislation must be charged not to the courts, but to Congress, and to the difficulty of its tax-imposing task.

Id. at 153.