NOTES

DEATH AND TAXES—CODE SECTION 126 AND THE DEVELOPING TAXABLE INCOME CONCEPT

When a person dies there is always one individual who retains an interest in the deceased's lifetime activities—the tax collector. The most reprehensible decedent will not be forgotten so long as his successors receive proceeds which emanate to an ascertainable extent from the decedent's lifetime activities.

Suppose, for example, the estate of John Doe includes two items—accrued salary of $50,000 due him at his death, and common stocks for which John had paid $60,000, worth $120,000 at the time of death. The $170,000 is included in his gross estate for federal estate tax purposes. All of his property is bequeathed to his widow.

For a one year period after John's death, his employer voluntarily pays amounts equivalent to John's former salary to the widow. The widow also collects the accrued salary that had been due at death and sells the common stock for $120,000. Each of the three transactions embodies a peculiar income tax application.

Prior to the 1942 enactment of Code Section 126,[1] the voluntary payments to the widow by the former employer probably would have been considered a gift rather than income since the *widow* had rendered no services to the employer.[2] Because the payments were voluntarily made, no valuation could have been given them for estate tax purposes.

But the fact that the accrued salary due John at his death and the value of the common stocks were included in his gross estate was considered sufficient justification to apply a "conversion of corpus" rationale: Neither the receipt of the right to claim the accrued salary nor the receipt of the ownership rights in the common stock were taxable,

---

1. INT. REV. CODE § 126.

2. I.T. 3329, 1939-2 CUM. BULL. 153; Louise K. Aprill, 13 T.C. 707, 711 (1940); *cf.* Bogardus v. Commissioner, 302 U.S. 34 (1937), where the court held that payments voluntarily made by a corporation to former employees constituted gifts although the facts clearly indicated the payments were made because of faithful past services. In a dissenting opinion by Justices Brandeis, Stone, Cardozo and Black the controlling element of "voluntary" was challenged: "What controls is not the presence or absence of consideration. What controls is the intention with which payments, however voluntary, have been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquitance has been given? If so, it bears a tax. . . ." *Id.* at 45. See note 61, *infra.*

since "property acquired by bequest, devise or inheritance" is exempt from income taxation by Code Section 22(b)(3);[3] moreover, since the rights were thus acquired, Section 113(a)(5)[4] gave the widow a new basis[5]—fair market value of the property at her husband's death; proceeds subsequently received by her constituted a mere "conversion of corpus" and were not subject to income tax.[6]

Tax exemption of the widow, however, did not mean that all these proceeds escaped income tax under the pre-1942 law. Another section of the Code, Section 42,[7] provided for the taxation of certain proceeds in the decedent's final income tax return which must be filed by the decedent's representative.[8] The value of the accrued salary due John at his death would have been taxable in his final return.[9] Although such a result often caused an unfair bunching of income in the decedent's final return, it was necessary in order to subject obvious income items to taxation. Accrued salary due at death was such an income item. But the scope of Section 42 was limited to obvious income items; while the section was broad enough to encompass such "rights to income" where the decedent had completed all performance necessary to mature the right, it was never extended to cases where decedent's bundle of rights was concentrated in property other than immediate "rights to income." Therefore, no income would have been reportable in John's final return despite the increased value of his common stock holdings when he died,[10] even if the widow had merely to deliver the stock to a vendee with whom decedent had contracted.[11]

In the example, then, prior to 1942 the accrued salary due John would have been taxable, but the payments voluntarily made to the widow by the former employer and the proceeds received by the widow when she sold the stock would have escaped all income taxation.

---

3. INT. REV. CODE § 22(b)(3).
4. *Id.* at § 113(a)(5).
5. The word "basis" is a technical word used in federal tax law which designates the amount that is used in computing gain or loss when the property involved is sold or exchanged. Thus: Receipts—(adjusted) basis=gain, or (adjusted) basis—receipts= loss. Cost of property is the usual basis, but there are others. See INT. REV. CODE § 113.
6. Nichols v. United States, 64 Ct. Claims 241 (1947). Many cases have indicated the controlling nature of the *Nichols* case in this field; indicative are Wm. P. Blodgett, 13 B.T.A. 1243 (1928) and Kemper v. Administrator, 14 B.T.A. 931 (1928).
7. INT. REV. CODE § 42.
8. See 2 MERTENS, LAW OF FEDERAL INCOME TAXATION § 13.14 (1942).
9. Helvering v. Enright, 312 U.S. 636 (1941).
10. Helvering v. Reynolds, 313 U.S. 428 (1941).
11. Commissioner v. Alldis Estate, 140 F.2d 885 (6th Cir. 1944). At time of his death the decedent owned 100 shares of beneficial interest in the Chrysler management trust; prior to death the decedent had contracted for the sale of the shares to the trust to be effective upon death. The appreciation in value of the shares during decedent's lifetime was held not taxable under the pre-1942 Section 42.

Such a result is of vital concern to all taxpayers. Given a certain amount that is needed to finance the federal government, every time certain classes of proceeds are held non-taxable the required funds must be obtained from other taxpayers. Unless resort is made to deficit financing, this means tax rates must be raised or, in any event, cannot be lowered as much as would otherwise be possible. Most of the people thus pay higher taxes because certain proceeds received by a few escape income taxation. The purpose here is to indicate the extent to which a 1942 tax amendment sanctions a more equitable tax burden in this area.

The Revenue Act of 1942[12] established a new scheme for taxing amounts received by the successor of a decedent when such amounts result to a sufficient extent from the decedent's activities. Code Section 42 was amended[13] so as to eliminate the necessity for including these amounts in decedent's final return. A new section, Section 126, was added which provides that the recipient of "income in respect of a decedent" shall be taxable on such income.[14] Section 22 which defines "income" was amended to include Section 126 income as a new component of gross income.[15] When proceeds are now received by a successor of a decedent, Section 126 will be of primary importance in determining the quality of such proceeds.

Well-reasoned conclusions have indicated that the scope of the 1942 amendments is to be determined by application of the purpose of the legislature to establish a more equitable scheme of income taxation.[16] Since the available legislative history merely indicates which areas have been changed,[17] interpretation of the legislation must amalgamate such segments into a logically-consistent whole.

---

12. Revenue Act of 1942 § 134, 56 STAT. 830 (1942).

13. *Id.* at § 134(a) ; INT. REV. CODE § 42.

14. *Id.* at § 134(e) ; *Id.* at § 126.

15. *Id.* at § 134(c) ; *Id.* at § 22(1).

16. Note, 65 HARV. L. REV. 1024, 1032 (1952) ; Polisher, *Income in Respect to the Decedent,* 56 DICK. L. REV. 269, 274 (1952).

17. SEN. REP. No. 1631, 77th Cong., 2d Sess. 100 (1942) ; H. R. REP. No. 2333, 77th Cong., 2d Sess. 83 (1942) ; *Hearings before Committee on Finance on Revenue Revision of 1942,* 77th Cong., 2d Sess. 71 (1942) ; *Hearings before Committee on Ways and Means on Revenue Revision of 1942,* 77th Cong., 2d Sess. 89 (1942). Usage of statutory history to any substantial extent should probably be discouraged; the various reports are peculiarly susceptible to the manipulations of legislative craftsmanship. See 1 MERTENS, LAW OF FEDERAL INCOME TAXATION § 3.26 (1942). For an argument to the effect that the available history supports the contentions made in this paper, see note 86, *infra.*

The regulations are not too relevant to this discussion. First, they are of an evanescent quality, see T.D. 5459, 1945 CUM. BULL. 193, which significantly amended U.S. Treas. Reg. 111 § 29.126-1. Second, the Commissioner's regulations are merely interpretative and not by any means conclusive evidence of the law, Koshland v. Helvering, 298 U.S. 441 (1936).

DECEDENT'S FINAL RETURN

Since the "conversion of corpus" approach insulated a successor from income taxation, the only apparent solution was to tax rights before they became corpus. This method was first utilized in the Revenue Act of 1926 which provided that where a decedent had been reporting income on the installment basis, his death would be deemed a disposition and the difference between the fair market value and the decedent's basis would be income to the decedent.[18] To the objection that the Section taxed unrealized gains, the courts responded that installment reporting was a privilege and decedent had consented to the disposition provision.[19]

But the consensual installment sales treatment solved only a fraction of the entire problem. If the decedent had been on a cash basis, his final return included only cash receipts as income.[20] That the definition of taxable income should vary in accordance with a controllable selection of an accounting method was irrational. In the Revenue Act of 1934, therefore, Congress sought to catch the subsequent untaxed proceeds; Section 42 provided:[21]

> . . . [I]n the case of the death of a taxpayer, there shall be included in the gross income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

The definitive *Enright* case held that this Section comprehended a legal claim of a cash basis decedent at the time of his death, even though the claim was based on *quantum meruit*.[22] The rationale of the case also embraced a claim which matured solely by reason of the decedent's death; where, for example, the decedent's contractual obligations could be fully performed only by his death, the perfected claim was his income.[23] Rampant criticism of the *Enright* doctrine was based not upon

18. 44 STAT. 23 (1926), INT. REV. CODE § 44(d).
19. Crane v. Helvering, 76 F.2d 99 (2d Cir. 1935).
20. See Parlin, *Accruals to Date of Death for Income Tax Purposes*, 87 U. PA. L. REV. 295 (1939); May, *Taxable Income and Accounting Bases for Determining It*, 40 J. ACCOUNTANCY 248 (1925).
21. 48 STAT. 694 (1934); INT. REV. CODE § 42.
22. Helvering v. Enright, 312 U.S. 636 (1941). Enright was a member of a law partnership. The partnership agreement provided that the estate of a deceased partner would receive the partner's share of subsequent receipts on account of business that had been unfinished at the partner's death. Against the contention that a right to receive payment was a prerequisite to accrual, the court responded that accrual as used in the statute was meant to further the policy of including in decedent's final return all assets earned during his life even though the right was based on *quantum meruit*.
23. First Nat'l. Bank v. Manning, 100 F.Supp. 892 (D.N.J. 1951). Decedent had contracted with his employer that if he should die before a certain date his estate

the fact that the cash basis was equated with the accrual basis, but rather upon the contention that included as decedent's income were amounts that had not "accrued" by any recognized accounting standards.[24] Granting that such concentration of income in the decedent's last return was unfair, however, the financial fruit of the decedent's labor was certainly income to someone. Uncritical adherence to the "conversion of corpus" limitations on taxing a decedent's successor necessitated an artificial classification of the person taxable.

The elimination of the "conversion of corpus" doctrine by Section 126,[25] which allows a tax to be levied upon the recipient of such income, permits a realistic response to the query, "whose income is it?" Since bunching of income items in decedent's last return had become unnecessary, Section 42 was amended by replacing the above language with:

> . . . [I]n the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under Section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death.[26]

Under this present Section 42, decedent's final return not only need not, but *cannot,* include items which would not be includible under the decedent's accounting method.[27] Final returns of cash basis decedents will be computed on the cash basis;[28] returns of accrual basis decedents,

---

would receive what would have been his remaining salary. The amount received by the estate was taxable in decedent's final return since the right to payment accrued at the very instant of his death.

24. Gemmill, *Accruals to Date of Death for Income Tax Purposes,* 90 U. Pa. L. Rev. 702 (1942); Wentz, *Distortion of Income Tax Occasioned by Death and the Misapplication of Graduated Rates,* 19 Taxes 707 (1941).

25. Int. Rev. Code § 126(a)(1). "General Rule. The amount of all items of gross income in respect of a decedent which are not properly includible in respect of the taxable period in which falls the date of his death or a prior period shall be included in the gross income, for the taxable year when received, of . . . [the recipient of the right to receive the amount]. . . ." See Ralph R. Huesman, 16 T.C. 656 (1951).

26. Revenue Act of 1942 § 134(a), now Int. Rev. Code § 42.

27. Estate of Fred Basch, 9 T.C. 627 (1947). Here the decedent was on the cash basis; his executor included in decedent's final return employment bonuses and commissions which were not determined until after death. The Tax Court upheld the commissioner's exclusion of these items from decedent's final return and remarked that the only theory of inclusion would be constructive receipt since decedent had been on the cash basis.

28. The cash basis of accounting defers recognition of income until cash is received. The principal criticism of this accounting method is probably that it fails to coordinate the rendering of services and the recognition of income. See Paton, Accountant's Handbook 114 (1948). One exception to a strict requirement of receipt is that if cash is "subject to a man's unfettered command and . . . he is free to enjoy it at his own option . . ." realization of income cannot be avoided by refusal to claim

on the normal accrual basis;[29] and subsequently received income items are taxable to the recipient if they were not included in decedent's final return.[30]

Where the proceeds received by the successor in interest arise from decedent's share of partnership profits, an additional variable confronts the courts. Code Section 188 provides that where a partner and a partnership have different taxable years, the personal return of the partner will include his share of the partnership income "for any taxable year of the partnership ending within or with the taxable year of the partner."[31] Prior to the enactment of Section 126, courts generally held that since death dissolved the partnership,[32] a partnership taxable year terminated with the final taxable year of the partner, and the express language of Section 188 compelled the inclusion of decedent's share of partnership profits to the date of death in his final return.[33] This reasoning applied to both accrual and cash basis decedents even though the partnership agreement provided specifically that the partnership would not be dissolved by death.[34] Undoubtedly the "lacuna" in the pre-1942 law was an important factor in these cases.[35]

---

the amount available. Corless v. Bowers, 281 U.S. 376 (1930). Another limitation on use of the cash basis is that it must clearly reflect income, INT. REV. CODE § 41; the Commissioner is given an additional sanction to prescribe usage of inventories, INT. REV. CODE § 22(c).

29. The usual accounting treatment is to accrue income only when there has been a completed contract or sale and the amount in question has become an unequivocal asset of the taxpayer. PATON, ESSENTIALS OF ACCOUNTING 77 (1949). This would eliminate the *Enright* rationale of accruing *quantum meruit* claims.

30. Sarah L. Narischkine, 14 T.C. 1128 (1950); Estate of Fred Basch, 9 T.C. 627 (1947); Conner's Will, 75 N.Y.S.2d 709 (Surr. Ct. 1948).

31. INT. REV. CODE § 188.

32. UNIFORM PARTNERSHIP ACT § 31(4); UNIFORM PARTNERSHIP ACT § 30, distinguishes dissolution from termination.

33. Guaranty Trust Co. v. Commissioner, 303 U.S. 493 (1938); the result was that decedent's final return included his share of partnership profits for a period exceeding sixteen months. See also Waddell v. Commissioner, 102 F.2d 503 (1939). *But cf.*, Henderson's Estate v. Commissioner, 155 F.2d 310 (5th Cir. 1946), where the question was evidently one of partnership continuity as it effects the partnership informational return. Both state law and the partnership agreement provided for continuity of the partnership.

34. A problem arose as to the determination of partnership profits up to the date of death when the partnership continued as an entity and only determined profits at the end of the business year. In such a situation the actualities might have been such that an accounting at the date of death would have disclosed a loss, all profits being earned thereafter. The courts held that where the Commissioner prorated the entire year's earnings and assessed a deficiency, the burden was on the taxpayer to disprove the allocation, Darcy v. Commissioner, 66 F.2d 581 (2d Cir. 1933). But where the Commissioner sued to recover a previously refunded amount and prorated the year's profits, the burden was on the Commissioner to prove such apportionment was correct, United States v. Wood, 79 F.2d 286 (3rd Cir. 1935), *cert. denied*, 296 U.S. 243 (1935). In the latter case the court stated that the Commissioner was not aided by the presumption of correctness present in a suit to collect taxes.

35. Girard Trust Co. v. United States, 182 F.2d 921, 925 (3rd Cir. 1950).

A current conflict in the circuits exists as to the effects of the 1942 Act on these partnership cases. Three circuits now hold that where the partnership agreement specifically provides for continuation of the partnership after a partner's death, no partnership taxable year terminates and hence Section 188 does not apply.[36] The Second Circuit, however, has held that Section 126 did not "change the law as to what items are properly includible in a final return"; and Section 188 still controls the results since a partnership taxable year ends with the dissolution of the partnership at decedent's death.[37] While this Second Circuit *Waldman* case could be distinguished on the grounds that the partnership agreement gave the decedent's executor an option to continue in the partnership, the court pointedly refused to distinguish the conflicting cases. The controversy now seems eligible for Supreme Court scrutiny.

A mechanical approach could be utilized which would emphasize the entity theory of the partnership and the resultant continued existence of the business, or the Court could say that since Section 188 provides a tax on a partner only for partnership years ending "within *or* with" the partner's tax year, it has no effect where one partnership year has previously ended within the decedent's final tax year. (emphasis added) Application of a more realistic policy argument would include variations of these tests. *First,* the Court should refuse to apply the entity (continued-existence) theory either if the decedent and the partnership had conterminous tax years, or if no partnership tax year has yet ended within the decedent's final tax year; to do otherwise would exclude from decedent's final return all partnership income during his final year.[38] *Second,* the Court should apply the entity concept where the tax years of partnership and taxpayer are different and a partnership

36. Commissioner v. Mnookin's Estate, 184 F.2d 89 (8th Cir. 1950); Girard Trust Co. v. United States, 182 F.2d 921 (3rd. Cir. 1950); Henderson's Estate v. Commissioner, 155 F.2d 310 (5th Cir. 1946). While state law sanctioned the continuance of partnerships in these cases, that should be immaterial. The federal income tax establishes a federal question, and results are not to be controlled by state law. Lyeth v. Hoey, 305 U.S. 188 (1938).

37. Commissioner v. Waldman's Estate, 196 F.2d 83 (2d Cir. 1952). A dissenting opinion was filed by Judge A. N. Hand who would have followed the *Girard Trust* case, *supra* note 36.

38. Utilization of the entity theory here would mean that there is no distributive share due the decedent at his death, and he is not within the strict terminology of the statute, INT. REV. CODE § 182, hence not taxable. But so far as Code § 42 is concerned, the 1942 amendment merely constituted a relief provision to relieve the decedent's final return from an inequitable concentration of income. SEN. REP. No. 1631, 77th Cong., 2d Sess. 100. Furthermore, the language of the present § 42 provides that the normal accounting system of the decedent will not continue as to ". . . amounts includible in computing a partner's net income under Section 182. . . ." *Supra* note 26 and text discussion. Under this first test, then, both the statute and legislative purpose reject the entity theory and the *Guaranty Trust* case, *supra* note 33, should still control.

year has ended within the decedent's current year, since failure to do so would cause an unfair concentration of income in the decedent's final return.[39] A possible variance of this second test would inspect the partnership agreement; if continued existence were mandatory, the Court might feel more justified in applying the test than if the decedent's successor were given an option to continue. While such control over imposition of taxation might justify a different result if contemplated tax reduction were shown, certainly taxable results should not turn upon knowledge of legal technicalities of form.

While Section 188 introduces uncertainty into the partnership cases, Section 42 will mitigate the impact of a decedent's final income tax liability. This is, however, only an incidental result of the Revenue Act of 1942 in this area.[40] The focal point of the 1942 Act is Section 126 which taxes to the decedent's successor "income in respect of a decedent." While the definition of Section 126 income is of primary interest, the mechanics of the statute merit a brief inspection.

Operation of Section 126

Only where the taxable period during which decedent dies began after January 1, 1943, will application of the 1942 Act be mandatory. If the taxable period began during the prior nine years, the pre-1942 law controls unless "consents" are filed with the Commissioner.[41] Resolution of the problem as to when consents should be filed must be made by contrasting the tentative concentration of income in decedent's final return under the *Enright* rationale with the alternative inclusion of Section 126 income in returns of recipients thereof. The few decisions on the subject have emphasized the necessity of formal sworn consents being filed by every person who would receive a right to income from

---

39. Application of this second test, pursuant to the controlling rationale to avoid unfair bunching of income, indicates that the Second Circuit *Waldman* case, *supra* note 37, is clearly erroneous. In that case decedent died in November, 1945. The Commissioner assessed a deficiency contending that the executor, in addition to reporting decedent's share of the partnership income for the business fiscal year ended June 30, should have reported the cash calendar-year decedent's portion of partnership income to the date of his death. The Tax Court, 15 T.C. 596 (1950), reversed but were in turn reversed by the Second Circuit which thus condoned an inclusion of seventeen months partnership income in the decedent's final return. Since the statutory-relief purpose was modified only to prevent a decedent partner's final return from reflecting no partnership income, *supra* note 38, the court ignored one of the primary purposes of the 1942 amendments.

40. Polisher, *Income in Respect to the Decedent,* 56 Dick. L. Rev. 269, 274 (1952); Note, 65 Harv. L. Rev. 1024, 1027 (1952); *Compare* Randolph Peyton, 44 B.T.A. 1246 (1941), *with* Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951).

41. Revenue Act of 1942, § 134(g), 56 Stat. 832 (1942).

the decedent.[42] While the greater scope of Section 126 would indicate that consents will be few, not many cases concerning tax years beginning almost ten years ago are still subject to scrutiny.[43]

Once Section 126 is determined to be applicable, the person taxable must be ascertained. Usually the income in respect of a decedent will be taxable to the recipient, whether the estate or a successor in interest of the decedent. If, however, the *right* to receive Section 126 income is "transferred" by one entitled to receive the proceeds, the transferor of the right will be immediately taxable upon "the fair market value of such right at the time of such transfer plus the amount by which any consideration for the transfer exceeds such fair market value."[44] While an uncritically-worded special ruling has indicated that modification of the interpretative treasury regulations are contemplated,[45] certainly the statutory mandate is valid where the transfer is by gift. In such instances the realistic *Horst* doctrine governs and thereby prevents tax avoidance by transfer of a right which transfer is itself the "fruition of an economic gain."[46] The only amendment needed would be one to eliminate the possibility of a bequest by a successor of the original decedent being classified as a transfer. In such cases the successor is himself a decedent, and Section 126 applies to *his* rights making them taxable to those who could otherwise be termed "transferees." Any distinction between rights of a decedent which arose during his lifetime from his own efforts and those which he had acquired by bequest from a prior decedent would be without substance in this area where Section

42. Larkin's Estate v. Commissioner, 167 F.2d 115 (2d Cir. 1948) (testamentary trustees and residuary legatees must file consents); Estate of Remington, 9 T.C. 99 (1947) (allowed consents typed on return); Estate of Ingraham, 8 T.C. 701 (1947) (charitable legatees required to file formal consents under oath with the Commissioner).

43. 10 MERTENS, LAW OF FEDERAL INCOME TAXATION § 57.04 (1942).

44. INT. REV. CODE § 126(a)(2).

45. Special Ruling, 4 P-H FED. TAX SERV. ¶76,293 (1952): "[The transfer provision] is believed to be inconsistent in part with the provision of the [code] providing for the taxing of income in respect of a decedent to the person who actually receives the income. There is now under consideration a proposed amendment. . . ." The ruling was necessitated by a case in which a successor had become a decedent before collecting the "right"; the ruling is, therefore, consistent with the text discussion.

46. Helvering v. Horst, 311 U.S. 112 (1940). In this famous case, the taxpayer detached unmatured bond interest coupons and presented them to his son. The son received the interest at maturity and included it in his taxable income. The Commissioner assessed a deficiency against the taxpayer contending that he, rather than his son, was taxable in regard to the interest. The Supreme Court upheld the Commissioner: "The taxpayer has equally enjoyed the fruits of his labor or investment and obtained the satisfaction of his desires whether he collects and uses the income to procure these satisfactions or whether he disposes of his right to collect it as the means of procuring them. . . ." *Id.* at 117. *Cf.* Helvering v. Clifford, 309 U.S. 331 (1940), where the taxpayer was held taxable on income from a five year irrevocable trust established for the benefit of his wife.

126 resanctions taxation of income in respect of the second decedent. The most immediate problem in such a case would be to determine the "character" of the income proceeds in the hands of the second decedent's successor.

The Act provides that Section 126 income shall be taxable to the recipient as though decedent had lived and received the proceeds; both the holding period and the character of the income shall be determined by applying this test.[47] If a right acquired by bequest were bequeathed a second time, the statute would require use of the first decedent's holding period and characterization. Such a problem indicates that the rationale of Section 126 should be based upon the fact that, since rights bequeathed by a decedent resulted from *his* efforts, classification of subsequent proceeds received by successors should relate back so as to render taxable the portion of the receipts for which decedent was responsible.

Just as the decedent's fruitful quest for income gives rise to inclusions of gross income in successors' returns, so too deductions attributable to his income activities are allowable. Expenses, interest, taxes and foreign tax credits can be deducted and credited in the estate income tax return when paid.[48] The payment need not be made by the estate so long as it is liable to discharge the obligation. If the obligation is of such a nature that it is primarily a claim on property, however, then the deduction, when payment is made, will be allowed the successor in interest who acquires the property subject to the obligation. In only one instance will the person claiming the deduction have to receive Section 126 income: Percentage depletion will be allowed only to the person who receives the income to which it relates.[49]

Since Section 126 income usually will be a fruition of rights that were included in the decedent's gross estate, one additional deduction is granted the person who is taxable on the income, a "Deduction for Estate Tax."[50] A simple illustration indicates the reason for this concession.[51] Suppose a decedent receives $100,000 immediately before his

47. INT. REV. CODE § 126(a)(3). But see Rose J. Linde, 17 T.C. 584 (1951), where what would have been an ordinary gain if received by the decedent changed its characterization and became capital gain to the successor. For a discussion of this amazing case see note 77, *infra*.

48. *Id.* at § 126(b)(1).

49. *Id.* at § 126(b)(2).

50. *Id.* at § 126(c).

51. "The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax." Mr. Justice Holmes writing for the Court in Fort Smith Lumber Co. v. Arkansas, 251 U.S. 532 (1920). And see Waud v. United States, 48 F.2d 444 (1931), where it was held immaterial that a right to income which had previously been subjected to estate tax was also taxed as income to the estate when received.

death and pays income tax thereon of $40,000; only $60,000 will be included in his gross estate. But if the $100,000 is included first in his gross estate and a subsequent income tax is levied on that entire amount when a successor receives it, it could be argued that there is an inequitable tax on a tax. The problem arises because the taxable entity for the estate tax is larger than any one of the entities liable for the income taxes. Had the $100,000 been the only item in the gross estate and had there been only one legatee, obviously Section 126 income would have been reduced by the estate tax paid. Where specific amounts are funnelled to various taxpayers, and the estate tax is paid by the estate from the residue, it is a little more difficult to visualize why a deduction should be allowed when a successor obtains his entire amount unreduced by the estate tax. This peculiar tax result demands close scrutiny by the estate planner since he might wish to decrease legacies and bequests by the amount of this extra deduction allowed the recipients and increase the amounts given the residuary legatees from whose shares the estate tax is usually paid.[52]

With a preliminary comprehension of the scope of income taxable to a decedent in his final return, and an acquaintance with the mechanics of the statute, the primary inquiry as to precisely what constitutes "income in respect of a decedent" becomes more meaningful.

PURVIEW OF SECTION 126 INCOME—GRADATIONS OF SOURCE

To determine what proceeds constitute Section 126 income, analysis is best made by considering the source of the amounts received. An old income tax analogy, modified, whereby proceeds are said to arise from a seed, fruit or tree, is useful. A successor who receives amounts because of decedent's lifetime activities, but which amounts had not become legal claims at decedent's death, benefits because of a "seed" planted by decedent. When the amounts paid the successor are in satisfaction of a legal right to income, such as accrued wages, owned by decedent at his death, the recipient receives "fruit" matured by the decedent. And if a conversion is made of rights, other than rights to income (fruit), which the successor acquired from decedent, and those rights had grown in value during the period held by decedent, the seller of them benefits to an ascertainable extent from the "tree" cultivated by the decedent. This tree is unique in that it is both mature and immature at any given time; it can always be sold for a "fair market value," but it can also be retained without fear of spoilage. Usage of

52. 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 13.54 (1942).

the seed-fruit-tree trichotomy also emphasizes the special privilege that property-sale income, the tree in the analogy, has enjoyed in the past.[53]

Section 126 Income Arising from "Seed" Planted by Decedent. The keynote for this concept was indicated by Mr. Justice Cardozo in 1936. To the contention that a contingent claim existing on March 1, 1913, was transmuted into capital on that date, he retorted that "we do not identify the seed with the fruit it will yield."[54] Accordingly, items such as possible future partnership profits[55] and a past custom of decedent's employer to pay a bonus[56] have been excluded from decedent's gross estate. Such items are not influenced by Section 22(b)(3) or Section 113(a)(5), since a contention that something was acquired by bequest, devise or inheritance would be academic because the "something" has only a zero basis. When payments were made to a successor before the 1942 Act, the full amount received was held to be either income taxable under Section 22(a) or a gift from the payer. Payments on a valueless note were held to be income under this approach,[57] while voluntary payments made to a widow were gifts.[58] The addition of Section 126 has made the gift construction much less probable; renewal premiums[59] and voluntary bonus payments[60] have been held taxable through its application. Since such payments would have been taxable income to decedent had he lived and received the amount, the rationale of the Section, that receipts arising from decedent's lifetime efforts are clearly within its scope, will render taxable the amounts received by a successor. The prime utility of Section 126 in this area, then, is its reduction of a possible gift construction being placed upon these payments.[61]

---

53. *Hearings before Committee on Ways and Means on Revenue Revision of 1942*, 77th Cong., 2d Sess., 89 (1942) (remarks of Randolph Paul); 83 CONG. REC. 4930 (1938) (remarks of Senator LaFollette).

54. United States v. Safety Car Heating and Lighting Co., 297 U.S. 88 (1936). The Court recognized, however, that a subsequent receipt of the claim necessitated a referral to the primary contacts made before the 1913 date. *Id.* at 99. A dissent was filed by Justices Sutherland, Butler and Roberts.

55. Bull v. United States, 295 U.S. 247 (1935). But if the right to share in possible future profits is capable of valuation at death, and hindsight is not necessary to value the right, then that value is includible in the gross estate. McClennen v. Commissioner, 131 F.2d 165 (1st Cir. 1942).

56. See O'Daniel's Estate v. Commissioner, 173 F.2d 966 (2d Cir. 1949).

57. Helvering v. Roth, 115 F.2d 239 (2d Cir. 1940).

58. Louise K. Aprill, 13 T.C. 707 (1949) (pre-1942 Act governed).

59. Estate of Remington, 9 T.C. 99 (1947).

60. Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951).

61. *Supra* note 2. See also I.T. 4027, 1950-2 CUM. BULL. 9, which ruled payments voluntarily made to a widow will be considered gifts only when no services had been rendered the donor by the recipient or anyone else.

There exists an area where, although there might be no valuable rights for inclusion in the gross estate, subsequent receipts will be neither gifts nor Section 126 income. In some cases decedent will have contracted to have his estate or successor receive future partnership income which right is too speculative to justify valuation at death. When the involuntary payments are made by the partnership, a gift construction is not possible. The possibility exists, however, that the payments are in lieu of all other claims on the partnership which would have been available to the decedent. If so, the payments by the living partners are the purchase price of this interest; the only purpose of the percentage-of-profits price is to measure the value of the decedent's partnership interest at death.[62] When the decedent has no capital account at the time of his death, however, a sale construction is less likely and subsequent receipts from the partnership constitute ordinary income to the successor.[63] The fact that the decedent's successor is often a new partner in these cases and hence taxable under Section 22(a) minimizes the importance of Section 126 in this situation.

Emphasizing the importance of Section 126, however, where later payments to successors are not voluntary, are the contingent claims, unvalued at death, which are paid after decedent's death. Here there can be neither gift nor sale construction. The precise language of the Section is clearly applicable, and anything that would have been income to the decedent retains its characterization when collected.[64] If the contingent claims do have some value at death, then Section 126 will also eliminate application of the old "conversion of corpus" argument; but when such a valuation is made, the seed analogy becomes less pertinent.

Section 126 Income Arising from "Fruit" matured by Decedent. Once evaluation of an interest is made for estate tax purposes, the "conversion of corpus" argument replaces the gift construction as the primary obstacle to income taxation of the amounts received by decedent's successor. It was this hindrance which led to the *Enright* rationale of amounts taxable in the decedent's final return. One of the primary objectives of the 1942 legislation was to relieve such concentration of income by providing for taxability to the recipient of the income. The minimal scope of Section 126 is, therefore, the inclusion of amounts which would have been decedent's income under the pre-1942 law. That this is only the minimal purpose is verified by the fact that amounts not taxable to

62. Pope v. Commissioner, 39 F.2d 420 (1st Cir. 1930).
63. Bull v. United States, 295 U.S. 247 (1935).
64. United States v. Archer, 174 F.2d 353 (1st Cir. 1949).

decedent under *Enright*[65] have been held taxable under Section 126.[66] Since decedent's final return will now be filed in accordance with normal accounting methods, all omitted legal claims, including *quantum meruit* rights, comprise "income in respect of a decedent" when collected or transferred.[67]

Both inchoate claims, discussed previously, and these legally matured rights are based on past activity of the decedent. A more subtle situation arises where decedent had contracted to have future income paid to his successors and the status of the business entity is sufficient for one to evaluate the right. Since the "conversion of corpus" argument was used here, some courts indicated that the successor became a new partner, taxable under Section 22(a).[68] In order to take advantage of the deduction on account of estate tax, the amounts are now properly includible under Section 126. They clearly can be classified as decedent's income since decedent must have given consideration before any contractual rights arose. Decedent's efforts established the contractual right, and the mere fact that the reciprocal consideration is measured by future profits does not justify a distinction from any other legal claims perfected by decedent. The value of all are equally due to the fruit brought to maturity by his energies.

The phrase "brought to maturity" expresses the different treatment that some would still give "rights to income" and rights to other varieties of property. A decedent's successor need do nothing in order for income rights to mature, but a successor who acquires rights to other varieties of property has only that property unless he converts it by sale or exchange. Those who would import significance to this distinction consider it one thing to pick fruit which is itself income, but deem it quite different not only to be required to pick the fruit but also

65. In Randolph Peyton, 44 B.T.A. 1246 (1941), the Board held that moral obligations, having no basis in *quantum meruit,* paid to a decedent's estate by his former partners were not subject to tax in the decedent's final return.

66. In Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951), voluntary payments were made by decedent's former employer to his estate. The court held the estate taxable under Section 126 since the executors ". . . in contemplation of law continued the legal personalities of the employees and were specifically taxed under Section 126(a) upon receipts for services by their testators. . . ." *Id.* at 314.

67. Ralph R. Huesman, 16 T.C. 656 (1951) (bonus due decedent at death); Sarah L. Narischkine, 14 T.C. 1128 (1950) (alimony arrearages owed decedent at death); Fred Basch, 9 T.C. 627 (1947) (bonus and interest due decedent); *In re* Conner's Will, 75 N.Y.S.2d 709 (Surr. Ct. 1948) (accounts receivable due decedent).

68. See First Nat'l. Bank of Mobile v. Commissioner, 183 F.2d 172 (5th Cir. 1950); *cf.* Bull v. United States, 295 U.S. 247 (1935). This is the situation in which the courts could hold that if the payments satisfy all claims the decedent had against the business, the payments to the successor are in payment of a sale of the decedent's interest in the business. *Supra* notes 62 and 63 and text. As to the basis of that interest in the successor's hands, see the text discussion, *infra.*

to haul it to market and exchange it for income. Such a conceptual approach to concrete tax cases would result in illogical variances.

Suppose, for example, decedent farmer bequeathed son *A* accounts receivable worth $100,000, and son *B* a grape crop likewise worth $100,000; assume decedent had a zero basis in both assets. Shortly after decedent's death, *A* sells his receivables and *B* his grapes, each receiving $100,000. Under the position taken above, while *A* would be taxable upon the entire $100,000,[69] *B's* proceeds would be *entirely tax exempt.*[70] Moreover, if *B* had received only $90,000 for the grapes, the position taken means *B* can claim a $10,000 loss in his personal return. Such an anomalous result is rationalized in terms of a "taxable event." Until rights in property have been converted to rights to income there is no taxable event.

Section 126 Income Arising from a "Tree" Cultivated by Decedent. The necessity for a taxable event before income arises for tax purposes prevents the mere holding of property from engendering taxable income.[71] Were it simply a matter of awaiting a taxable event before subjecting economic income to tax, no serious problem would arise. But Section 113(a)(5) of the Code provides that when a person dies and leaves property to a successor, the basis to the successor shall be the fair market value at decedent's death. While the very existence of a fair market value emphasizes the fact that the only thing the successor need do to convert his property tree into income fruit is to enter the marketplace, the past operation of Section 113(a)(5) has meant that upon doing so he received income only to the extent by which the selling price exceeded his new basis.[72] The most important inquiry in

69. Dixon v. United States, 96 F.Supp. 986 (E.D. Ken. 1950).

70. Rose J. Linde, 17 T.C. 584 (1951), *Comm'r nonacq.* 4 P-H FED. TAX SERV. ¶ 76,187 (1952). For a discussion of this case, see note 77, *infra.*

Typical of the arguments made in support of such a result are: ". . . rights to proceeds of sale are not rights to income for the purposes of § 126, but are capital assets to be treated the same as other assets, regardless of the fact that they are . . . ordinarily productive of taxable gain when converted into cash. . . ." Scott, *A Critique of Section 126,* 26 TAXES 127, 133 (1948); ". . . although Congress obviously sought a fair reflection of income, 'it is immaterial that all possibility of escaping an income tax is not barred'. . . ." Wright, *Taxation of "Income in Respect of a Decedent,"* 31 NEB. L. REV. 522 (1952).

71. Estate of Burnett, 2 T.C. 897 (1943).

72. U.S. Treas. Reg. 111, § 29.113(a)(5)-1. This provision does not operate in favor of the taxpayer in all instances; if decedent's basis was higher than the fair market value at his death, the taxpayer takes the lower basis which is a tax disadvantage. Herbert's Estate v. Commissioner, 139 F.2d 756 (3rd Cir. 1943). But in modern times when the norm is inflation, much income escapes taxation when property is subsequently sold. Since § 126 is concerned only with income, it applies only when decedent's basis is lower than the market value at his death. Where decedent's basis is higher than that figure there would be a "loss in respect of a decedent" and the statute is inapplicable.

interpreting the 1942 Act is the extent to which Section 126 limits the operation of Section 113(a)(5); when a taxable event does occur to what extent will the successor realize "income in respect of a decedent"?

That there is a difference between original income earned by the successor and income from the sale of property left by decedent has been realized in the field of estate income taxation. An estate is entitled to deduct in its income tax return amounts of the current income which are "to be distributed currently" or amounts "properly paid or credited" to legatees, heirs or beneficiaries if the latter report the income on their tax returns.[73] This rule has been held not to apply, however, where the estate income arose from sales of property left by a decedent.[74] Although the courts talk generally in terms of corpus appreciation in such cases, it is significant that they comprehend the fact that the decedent had greater contacts with the income than did the estate.

Maximum beneficial contacts of decedent with property-sale proceeds exist in cases where the decedent leaves the property subject to a non-personal[75] contract for sale. Since property in the goods still remains in decedent at his death, no "right to income" replaces the property itself in decedent's estate. To hold that this difference influences subsequent income taxation of amounts received on account of the contract would be superficial; decedent's efforts gave rise to the subsequent income no less than if the property in the goods had been transferred to the vendee at decedent's death.[76] It should not be material that the contract is not one specifically enforceable; even contractual damages are intended to satisfy the proximate expectations of the parties. The proper treatment of the excess of the contractual amount due the decedent over his basis would be to include it as a separate item in his gross estate as a right to income. Inclusion of this figure in the value given the property for estate tax purposes, however, should not be allowed to camouflage the income right procured through decedent's labors. Decedent died owning a contractual right to income and, as the direct creation of his efforts, the net value of the claim should invariably be characterized as Section 126 income when received.

---

73. Int. Rev. Code § 162(b), (c).

74. Dunlop v. Commissioner, 165 F.2d 284 (8th Cir. 1948); Burchenal v. Commissioner, 150 F.2d 482 (6th Cir. 1945); *In re* Rogers' Estate, 143 F.2d 695 (2d Cir. 1944).

75. A contract that has as its object personal services by the decedent would be discharged upon his death. 2 Williston on Contracts § 411 (1936).

76. It is not within the scope of this note to discuss the intricacies of passage of title. Assume a decedent had contracted with his business partners for them to purchase his interest at death; would that be a sale or a contract to sell? There is a disagreement. 1 Williston on Sales § 6 (1948). Certainly results should not depend upon words like "sale" or "contract for sale" which are themselves controversial.

While decedent had "title" to this right to income prior to death, cases will arise where decedent had initiated contractual negotiations not completed at the time of his death. Here it will be argued the result should be different since no matured right existed when decedent died.[77] Few would base this argument on the theory that the right had not legally matured at decedent's death since tax law is not concerned with refinements of title; rather, the argument would allege a different result should follow because the decedent's contacts had not been sufficient to consummate the transaction and further efforts were required by the successor. It would be a strange *corpus juris* that required brokerage commissions be paid when contracts were sufficiently initiated by a broker,[78] but refused to inspect a decedent's efforts in an analogous situation. Not much realism is required for one to apply the analogy to situations in which the successor sells the property involved to the person with whom decedent was negotiating. The decedent's selling efforts were the efficient cause of the sale of the property to that vendee.

But there is no indication that Congress intended Section 126 income to be limited to instances in which a subsequent-to-death sale of the property resulted from decedent's activities. It is not his efforts to *sell* the property which is important; instead, it is his careful cultivation of the property during life which is significant. The value of his productive efforts are clearly measurable by the difference between his basis and the fair market value of the property when he dies. The successor can enter the market place and receive this market value; to the extent that the value exceeds decedent's basis, the income arises from

77. The puzzling case of Rose J. Linde, 17 T.C. 584 (1951), probably belongs in this category. Decedent had been a grape farmer; at the time of his death he had contributed his grape crop to various cooperatives in return for a prorata share of the proceeds after the pools had been "liquidated." He died before liquidation, and taxpayer was bequeathed his right in the unliquidated wine pools. The pools were finally liquidated and the taxpayer received the proceeds. The Commissioner contended the proceeds were taxable under § 126 because they arose from "deferred purchase agreements" the decedent had made with the cooperative. The Tax Court (Judge Hill) replied that there had been no sale, but rather the decedent had retained an equitable title, the cooperative becoming in effect a trustee. Since there was no sale, there was no right to income bequeathed the taxpayer; hence, Judge Hill said that the taxpayer's equitable interest was subject to § 113(a)(5) which boosted her basis to the market value of the interest when decedent died. Section 126 was held to be inapplicable.

The case seems completely erroneous. It is certainly inconsistent with the other § 126 cases which, when confronted by a problem of characterizing proceeds received by a successor, project the legal personality of the decedent onto the scene, Bausch's Estate v. Commissioner, 186 F.2d 313 (2d Cir. 1951); and if the receipts would have been taxable to decedent had he lived, then the successor is taxable in an identical manner under § 126. The Tax Court ignored one of the foremost principles of tax law, that the incidents of taxation should not depend upon technicalities of title. Corliss v. Bowers, 281 U.S. 376 (1930). The Commissioner, of course, nonacquiesced. 4 P-H FED. TAX SERV. ¶ 76,187 (1952).

78. 4 WILLISTON ON CONTRACTS § 1030A, n. 7 (1936).

decedent's efforts. The necessity for realization will defer the taxable event until the successor sells any property acquired by bequest, devise or inheritance; income to him then should be measured by using the donor's basis as the measure of gain.[79] By so doing, Section 126 income will not be governed by superficialities of contractual status—most property left by a decedent is easily saleable in the market. If a successor benefits from this increased value, it is because the amounts he receives in excess of the decedent's basis constitute "income in respect of a decedent."

The courts must now define the new scope of Section 113(a)(5). It is still fully applicable when the decedent's basis exceeds the market value of property at his death, since there would then be no advance in value of the property in decedent's hands.[80] If at death the property is incapable, as a practical matter, of being sold, the Section should still dominate even though a theoretical "market value" might exist.[81] Perhaps there are other areas where Section 113(a) (5) will still control; if so, the courts must be able to say that *for some definite reason* the spread between the decedent's basis and the higher market value at death does not yield "income in respect of a decedent."[82] The

79. The operative time to determine a successor's basis is date of death (or the optional valuation date, one year later). If at that time the market value is in excess of the decedent's basis, § 126 should give the successor the lower basis; even though the successor sells the property for less than this amount, that basis should apply. Although the successor will then realize no taxable income, "income in respect of a decedent" has served to reduce a loss otherwise reportable if the higher market value basis were used. The necessity for realization to occur permits the successor to fully offset against inchoate § 126 income all subsequent depreciation until date of sale. But decedent's successful efforts should not go unrecognized simply because the successor has failed to cultivate the property as efficiently.

Another problem that will arise when the successor does not immediately convert the property is the characterization of income received, as ordinary or capital. In such cases there would seem to be no necessity to classify it by reference to the decedent since the successor has exposed the property to the risks of his type of endeavor.

80. *Supra* note 79. This is obvious. Suppose the property is sold the day decedent dies for the lower market value. Use of decedent's basis would give a loss.

81. In some cases a successor will receive a non-assignable right that will be given a fictitious market value for estate tax purposes. Bank of California v. Commissioner, 133 F.2d 428 (9th Cir. 1932). The successor must be given a basis on this date, but although the actual result of §§ 126 and 113(a)(5) may be to give a successor the lower basis in the majority of cases, there is no language necessitating that result. If a non-assignable right fell below the decedent's basis before it became assignable and subject to the successor's unfettered control, it is difficult to say the successor received "income in respect of a decedent." It was the decedent who caused the claim to be non-assignable; this prevented the successor from realizing upon it had he chosen to do so.

82. For example, in the situation stated in note 81, *supra*, the justification would be: The basic idea of § 126 is that a successor should have to report as income the portion of appreciation in value that took place when the decedent held the property, offsetting against such an amount losses that resulted to the property when held by the successor. The legal concept behind this purpose is waiver; if the successor can easily

difficulty of drawing this line is of no consequence; for, as Mr. Justice Holmes remarked in a famous income tax case, ". . . [T]hat is the question in pretty much everything worth arguing in the law."[83] That a successor will usually take either (1) the lower of the decedent's basis or the fair market value at his death whenever the market value expresses true marketability, or (2) only the market value, if no sale actually can be made, as his new basis, provides a functional criterion of Section 126 income when realization finally occurs. Precise delineation will accompany the cases; that is the province of case law.

Code Section 126 sanctions income taxation of those proceeds received by a decedent's successor which were the resultant of the decedent's efforts. The general test to be employed is: If the decedent had lived and received the proceeds in controversy, would he have been subjected to income taxation? If so, the successor who receives such amounts is likewise taxable. When the proceeds arise from the sale of property that the successor vendor had received from the decedent, an additional inquiry is required: Was decedent's basis lower than the actual fair market value of the goods at his death? If not, Section 126 is inapplicable since the decedent's efforts have not increased the value of the property and the Section is only concerned with "*income* in respect of a decedent." (emphasis added) But an affirmative response will provide the successor with the decedent's basis for measuring subsequent income when a taxable event ensues.[84] The regulations specifically provide that when Section 126 applies, Section 113(a)(5) does not.[85] While the Commissioner has not yet fully interpreted Section 126 in its relation to Section 113(a)(5), it is anticipated that he will soon do so to effectuate the Congressional purpose of constricting the former scope of Section 113(a)(5) so as to avoid the previous inequities caused by that Section.[86]

convert to a clearly measurable market value when he receives the property, the statutory purpose is not to be frustrated if he chooses not to do so. But if the successor cannot convert the property, there is no method of foretelling the value of the property when conversion becomes possible. The necessities of efficient tax administration compel the application of a definite basis at a time certain, not dependent upon factual inquiries as to when property becomes assignable. Therefore, § 113(a)(5) controls giving the successor the higher fictitious market value at date of death.

If that Section is to apply in other cases, a similar justification must be given.

83. Irwin v. Gavit, 268 U.S. 161 (1925).

84. This basis should be used even though the sale price is below the substituted basis derived from the decedent, *supra* note 79.

85. U.S. Treas. Reg. 111, § 29.126-1.

86. As to these inequities, see *supra* note 70 and text.

The legislative history is not easily interpreted, but it does yield some indication of the reasons for passage of § 126. Randolph Paul, tax adviser to the Secretary of the Treasury, made two specific recommendations to the Ways and Means Committee which investigated the areas where tax reform was needed: (1) He recommended

"CONSTITUTIONAL" LIMITATIONS ON AMENDMENTS IN INDIANA

An amendment to a legislative act is, in every state, treated as a part of the original statute. Repeated portions of the original act are continued in force from the date of origin. The altered portions are a part of the original act but are effective only from the date of the amendment's adoption. Segments of the original statute which are omitted by the amendment are repealed thereby.[1]

In every state but Indiana, these amendatory rules comprise the entire theory of amendment, which has been characterized as the "original act theory" because it preserves the original act as the competent reference for subsequent amendment or judicial interpretation.[2] The early Indiana Supreme Court created two additional rules which are wholly repugnant to the "original act theory." The first holds that a section of an act, once amended, cannot be amended again;[3] the

---

that relief be given in the area where § 42 caused income to be bunched in a decedent's final return; (2) he recommended that the inequities caused by § 113(a)(5) be removed—". . . a large part of the capital gains inherent in the increased value of property thus escapes income tax as the assets are handed down from one generation to the other. . . ." The arguments appear at *Hearing before Committee on Ways and Means on Revenue Revision of 1942,* 77th Cong., 2d Sess. 89 (1942).

Two major organizations responded with contrary arguments. The American Bar Association suggested eliminating the *Enright* construction of § 42 but evidently without a provision being made for subsequent taxation of those amounts. ". . . [T]he purpose of our recommendation would be to eliminate and exclude from such accruals these uncertain, indefinite and undetermined amounts for incompleted personal services. . . . Mr. Paul, while reaching a somewhat different conclusion, recognized this inequity. . . ." *Id.* at 167.

The Chamber of Commerce of the United States replied to Mr. Paul's suggestion concerning the modification of the effects of § 113(a)(5). Logically stated, their argument was: Payment of estate tax necessitates conversion of bequests; (under Mr. Paul's suggestion) conversion of bequests necessitates payment of income tax; therefore, (under Mr. Paul's suggestion) payment of estate tax necessitates payment of income tax. *Hearing before Committee on Revenue Revision of 1942,* 77th Cong., 2d Sess. 1719, 1725 (1942).

These were the arguments before the respective committees. The American Bar Association's implication was rejected *haec verba.* It is doubtful that the interests represented by the Chamber of Commerce fared any better. While it is true that § 113(a)(5) was not amended directly, discretion probably forbid that. But Congress did succeed in using language in such a way that it avoided the pressures of special interests and yet gave the courts a statute precise enough to allow the elimination of an anachronism in our system of progressive taxation.

1. *In re* Assessment of Yakima Amusement Co., 192 Wash. 174, 73 P.2d 519 (1937); Worthington v. District Court, 37 Nev. 212, 142 Pac. 230 (1914); Village of Melrose Park v. Dunnebecke, 210 Ill. 422, 71 N.E. 431 (1904); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 1910 (3rd ed., Horack, 1943).

2. 3 SUTHERLAND, STATUTORY CONSTRUCTION § 1910 (3rd ed., Horack, 1943).

3. The distinction between amending a section of an act and amending the act itself is one of language only. It is obvious that the only way that an act can be amended is to amend one or more sections of that act. However, under the Indiana