NO. CV 13 6021058

ESTATE OF HELEN B BROOKS, ET AL.	:	SUPERIOR COURT
	:	TAX SESSION
v.	:	JUDICIAL DISTRICT OF
	:	NEW BRITAIN
KEVIN SULLIVAN, COMMISSIONER OF REVENUE SERVICES	:	APRIL 29, 2015

MEMORANDUM OF DECISION ON PLAINTIFFS' AND DEFENDANT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

The co-executors of the estate of Helen B. Brooks, Dorothy B. Newberth, Nancy B. Jackman and David S. Brooks, move for summary judgment against the commissioner of revenue services (commissioner), claiming that there are no genuine issues of material fact to be decided at trial and that as a matter of law, the plaintiffs are entitled to judgment in their favor. The commissioner also moves for summary judgment claiming that, as a matter of law, he is entitled to judgment in his favor.

The decedent, Helen Brooks (Helen), died on September 22, 2009 domiciled in Connecticut. She was the widow of Everett M. Brooks (Everett), who died domiciled in Florida on January 31, 2000.

Prior to his death, Everett executed a Last Will and Testament (Will) in which he created a Qualified Terminable Interest Property (QTIP) marital deduction trust. The trust was divided into Trust A and Trust B, both created under Article Eighth of the Will. Trust

A is entirely exempt from generation-skipping transfer taxes and Trust B is subject to generation-skipping transfer taxes.[1]

The QTIP trust that was created in Everett's Will provided for the benefit of Helen during her lifetime and on her death, the trust principal was to be transferred to Everett's children. The trust property consisted solely of cash, publicly traded stocks and bonds owned by Everett and transferred on his death to the QTIP trust. See ¶ 18 of affidavit of Attorney Herbert J. Hummers (Entry No. 111) in support of plaintiffs' motion for summary judgment. Everett's Will granted a life use of the trust property to Helen which provided income to Helen during the remaining years of her life. Upon Helen's death, the trust property, by operation of the trust created by Everett's Will, passed automatically to Everett's children.

Helen and Atty. Hummers were appointed as trustees of the QTIP trust. As a trustee, Atty. Hummers was given the power to invade the trust principal for Helen's

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[1] The Marital Deduction, § 2056 (a) of the Internal Revenue Code (IRC), "provides that an estate may deduct the value of any interest in property passing from the decedent to his or her surviving spouse . . . to the extent such interest is included in determining the value of the gross estate. The policy behind the marital deduction is that property passes untaxed from a predeceasing spouse to a surviving spouse, but is then included in the estate of the surviving spouse . . . .Thus, as a general rule, the marital deduction does not eliminate the estate tax on marital assets, but merely permits a deferral of tax until the death of the surviving spouse." (Citation omitted.) <u>Estate of Kite v. Commissioner</u>, T.C. Memo. 2013-43 (2013), p. 31.

benefit, but never did so. See Atty. Hummers' affidavit, ¶ 19. Atty. Hummers was not given a general power of appointment. Helen, as trustee, was neither given the power to invade the trust principal nor a general power of appointment.

In the preparation of Everett's federal estate tax return in Florida, the estate made an election to treat the QTIP property as qualifying for the marital deduction, the effect of which delayed the federal estate tax due on such property until Helen's death. Based on that election, the QTIP property was required to be included in Helen's federal estate tax return.[2] See joint stipulation of facts (Stip.), Entry No. 141, ¶ 11.

Following Helen's death, her estate paid the Connecticut estate taxes that included taxes on the QTIP property in her Connecticut taxable estate within six months of her death and requested an extension to file the Connecticut estate tax return. On November 4, 2010, the plaintiffs filed the estate's Connecticut estate tax return (Form CT 706/709) intentionally omitting the QTIP property. The plaintiffs sought a refund of estate taxes in

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As noted in Estate of Morgens v. Commissioner, 133 T.C. 402, 412 (2009), "[§] 2056 (b) (7) provides in pertinent part: (A) . . . In the case of qualified terminable interest property - (i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse, and (ii) for purposes of [¶] (1) (A), no part of such property shall be treated as passing to any person other than the surviving spouse.

"Although only a life interest actually passes from the first spouse to die to his or her surviving spouse, the entire QTIP obtains the deferral benefit of the marital deduction and escapes inclusion in the gross estate of the first spouse to die."

the amount of $988,827 claiming that the value of Helen’s estate should have been reduced by the removal of the QTIP trust assets.

The plaintiffs contend that the only assets in the QTIP trust were cash, stocks and bonds and, as intangibles, must have been owned by the decedent in order to be taxed by the state of Connecticut. The plaintiffs argue that Helen was not the owner of these assets because she only had life use of the QTIP trust assets.

The commissioner’s position is that ownership of intangibles is not an issue in this case because the taxation of the assets of an estate of a Connecticut resident begins with the assets contained in the federal gross estate. Therefore, all of the assets listed in Helen’s federal estate tax return, including the intangibles in the QTIP trust, must be listed in the Connecticut estate tax return.

Prior to its amendment in 2013, General Statutes § 12-391 (d) (3) provided as follows: “Property of a resident estate over which this state has jurisdiction for estate tax purposes includes real property situated in this state, tangible personal property having an actual situs in this state and intangible personal property *owned by* the decedent, regardless of where it is located.” (Emphasis added.) Subsequently, the legislature enacted § 120 of P.A. 13-247 which eliminated the words “owned by” from the statute.

Thereafter, § 12-391 (d) (3) reads as follows: “For a resident estate, the state shall have the power to levy the estate tax upon real property situated in this state, tangible personal property having an actual situs in this state and *intangible personal property included in the gross estate of the decedent*, regardless of where it is located."[3] (Emphasis added.)

The plaintiffs argue that the elimination of the phrase "owned by" the decedent was a significant change in § 12-391 (d) (3). Therefore, the plaintiffs contend that they are entitled to judgment as a matter of law because the QTIP property is not includible in Helen's Connecticut taxable estate for the following reasons: (1) the assets in the QTIP trust were not owned by Helen as required by § 12-391 (d) (3) before it was amended in § 120 of P.A. 13-247, (2) the QTIP election pertaining to the QTIP property was not made in Connecticut but in Florida and (3) Connecticut does not have jurisdiction over Everett's QTIP property or Everett's transfer of property at his death.

The plaintiffs disregard the fact that the estate tax in Connecticut is not governed by what happened in Florida, but on what happens to residents who die in Connecticut.

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The legislative history of § 120 of P.A. 13-247 shows that it was encompassed in emergency certified bill 6706. Senator Kelly asked the question: "Section 120, the state tax makes technical changes on the estate tax and how it's calculated for Connecticut residents who have an estate property in other states conforming to DRS regulations. What exactly does that mean?" Senator Fonfara responded: "The language preserves the current tax treatment of real and tangible property, which Connecticut has jurisdiction to tax." Senator Frantz inquired: "In the description of that bill, it says it provides for both residents and nonresident estates that the state may calculate and levy the tax to the fullest extent permitted by the U.S. Constitution." Senator Fonfara responded: "Through you, Madam President, the revision is technical and is consistent with how we've always implemented this procedure so it doesn't change the way Connecticut has implemented this provision previously."

General Statutes § 12-391 (c) (1) (A) defines, for estate tax purposes, a "'Connecticut taxable estate,'" with respect to the estates of decedents dying on or after January 1, 2005, but prior to January 1, 2010, to mean the "(i) the gross estate less allowable deductions, as determined under Chapter 11 of the [IRC], plus (ii) the aggregate amount of all Connecticut taxable gifts . . . ." The fact that it was the executor of Everett's estate that elected to recognize the QTIP trust in Florida does not affect the validity of the transfer of the QTIP assets to Helen in Connecticut. As the commissioner notes in his brief, the start of the determination of the estate tax of a Connecticut resident begins with Helen's federal gross estate. See defendant's memorandum, Entry No. 133, p. 24.

The commissioner argues that the assets in the QTIP trust, created under Everett's Will, have escaped the payment of estate taxes in Florida, and pursuant to the plaintiffs' argument, will also escape the Connecticut estate tax. Although the plaintiffs agree that the same trust assets must be included in Helen's estate for the payment of federal estate taxes, the plaintiffs contend that these same assets should be removed from Helen's estate in order to escape state taxation.

The plaintiffs discount the fact that the assets in a QTIP trust are not taxed in the estate of the spouse first-to-die because the estate of the first-to-die spouse is allowed to take a marital deduction on the basis of a fiction that the entire property has passed from

Everett to Helen and no part of the assets of the QTIP trust has passed to any other person other than the surviving spouse.[4]

Putting aside the fiction that Helen, as the surviving spouse, had received all of the assets contained in the QTIP trust, the plaintiffs side-step the plain language in § 12-391 (c) (3) that specifically states that the "'[g]ross estate'" for Connecticut estate tax purposes "means the gross estate, for federal estate tax purposes[,]" which in this case, includes the assets of the QTIP trust.

As discussed above, in 2013, the legislature enacted P.A. 13-247, amending § 12-391 eliminating the term "owned by" in favor of the language "included in the gross estate of the decedent . . . ."

The plaintiffs' reliance on the term "owned by" in § 12-391 (d) (3) prior to its removal by the 2013 amendment is misplaced. The elimination of the words "owned by," in reference to intangible personal property, was not a substantial change. Whereas real estate and personal property have a situs which can be a basis for taxation, intangible personal property has no situs because it has no physical presence. See 3 W. Locke & P. Kohn, Connecticut Probate Practice, p. 42. The situs of intangible personal property lies

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See In re Bracken, 290 P.3d 99 (Wash. 2012), referring to I.R.C. § 2056 (b) (7) (A). "In response to In re Bracken, the legislature [in Washington] amended the Estate and Transfer Tax Act . . . in 2013, retroactive to estates of decedents . . . who died on or after May 17, 2005." Bloch v. Washington State Dept. of Revenue, 44802-5-II (Wash. App. 12-30-2014).

with the one who possesses and controls the right of the intangible. See Curry v. McCanless, 307 U.S. 357, 365-366, 59 S. Ct. 900, 83 L. Ed. 1339 (1939): "Very different considerations, both theoretical and practical, apply to the taxation of intangibles, that is, rights which are not related to physical things. Such rights are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts. The power of government over them and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights."

The original succession tax statute in Connecticut, the Act of 1889, made no mention of ownership when describing intangible property. The Act of 1889 described the property subject to tax as "all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible. . . ." G. Wilhelm, Death Taxes in Connecticut 4th, § 6.2, pp. 6-6, 6-7.

In 2004, the Connecticut succession tax was repealed for estates of decedents dying after December 31, 2004 and was replaced with an expanded Connecticut estate tax in P.A. 05-251[5] that is the basis for General Statutes § 12-340. With the new tax, the

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P.A. 05-251 recited as follows: "(d) (1) With respect to the estates of decedents who die on or after January 1, 2005, a tax is imposed upon the transfer of the estate of each person who at the time of death was a resident of this state. . . . (3) Property of a resident estate over

Connecticut legislature did away with the "pick-up" tax which was a tax tied to the federal estate tax.

The enactment of § 12-340 described the property contained in the estate of a resident decedent as "(1) real property situated in this state; (2) tangible personal property, except such as has an actual situs without this state; (3) all intangible personal property. . . ." Again, no mention was made of "ownership" of intangible personal property. However, in comparison, when the issue of ownership of intangibles was specifically addressed by the legislature, the legislature expressly excluded intangible personal property owned *by a nonresident*. See G. Wilhelm, supra, pp. 6-8.

As previously noted, § 12-391 (c) (3) defines the gross estate in a Connecticut taxable estate as "the gross estate, for federal estate tax purposes." In a sense, the Connecticut taxable estate piggybacks the filing of a decedent's federal estate tax return.

When our Connecticut statutes are so intertwined with federal tax concepts, federal tax concepts are considered to be incorporated into state law. Berkley v. Gavin, 253 Conn. 761, 773, 756 A.2d 248 (2000).

In the present case, the federal tax concept that is key to the resolution of the issue in this case is the fiction that Helen, having only a life use in the QTIP property, is

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which this state has jurisdiction for estate tax purposes includes real property situated in this state, tangible personal property having an actual situs in this state and intangible personal property owned by the decedent, regardless of where it is located."

deemed to be the sole owner of the property for tax purposes. See I.R.C. § 2044 (a): “The value of the gross estate shall include the value of any property to which this section applies in which the decedent had a qualifying income interest for life.” Section 2044 (c) provides that “[f]or purposes of this chapter and chapter 13. . . property includible in the gross estate of the decedent under subsection (a) shall be treated as property passing from the decedent.” There is no clearer example of federal tax statutes being incorporated into our tax statutes than § 12-391 (c) (3), which specifically incorporates a decedent’s “gross estate, for federal estate tax purposes” into Connecticut tax statutes.

This federal tax concept introduced into Connecticut tax laws controls in the present case and supports the commissioner’s argument that “ownership” of the QTIP assets is not at issue here. The inclusion of intangibles in the decedent’s federal gross estate is incorporated into the decedent’s Connecticut gross estate.

The plaintiffs set forth, in their supplemental memorandum of law (Entry No. 145), p. 14, the following questions (Q1-Q2-Q3) for this court to answer:

Q1. Is the QTIP property properly includible in the decedent’s Connecticut taxable estate under the pre-P.A. 13-247 version of General Statutes§ 12-391, which was in effect at the time of the decedent’s death in 2009?

Q2. Can the State of Connecticut constitutionally apply a substantive change to the law retroactively? In other words, is it constitutional for a substantive change to the Connecticut estate tax laws, which effectively create a new tax obligation, to be given retroactive effect? Even if this

Court decides that the elimination of a requirement of ownership by the decedent as a predicate to the imposition of Connecticut estate tax is not substantive, can the State of Connecticut retroactively apply a statutory change in 2014 to a transfer that occurred on January 1, 2000, 14 years earlier?

Q3. Can the State of Connecticut constitutionally tax intangible property which was never owned by a Connecticut decedent or transferred from a Connecticut decedent?

The court answers as follows:

Q1. Yes, the QTIP assets are includible in Helen's estate because of the fiction expressed in IRC § 2056 (b) (7) that Everett, as the first-to-die spouse, has passed the QTIP property to Helen, his surviving spouse, and because § 12-391 (d) (3) defines a Connecticut gross estate as that of a federal gross estate.

Q2: No. There was no substantive change in § 12-391 (d) (3) when the word "ownership" was eliminated in § 120 of P.A. 13-247. The change was an expression of the legislature clarifying its intent to tax intangibles contained in the federal gross estate tax but only those intangibles that were in possession and control of Helen at the time of her death. Since the fiction created by 26 U.S.C. 2056 (a)-(b) places the assets of the QTIP trust in possession of Helen, she was the owner of the intangible assets in the QTIP trust. As presented by the plaintiffs, the only situation that would involve the issue of ownership would entail Helen being a Connecticut resident and having assets with a situs outside the jurisdiction of Connecticut. Since intangibles follow the person having the possession and control of an intangible, a person who dies a Connecticut resident would be the "owner" of the intangible even if the intangible was located outside the jurisdiction of Connecticut.

As to the issue of the retroactivity of § 120 of P.A. 13-247, it is clear that the legislature intended to clarify § 12-391 (d) (3). See Nash v. Yap, 247 Conn. 638, 661, 726 A.2d 92 (1999): "When the legislature is clarifying prior legislation, the correction has retroactive effect. According to well established principles of statutory construction, an amendment that construes and clarifies a prior statute operates as the legislature's declaration of the meaning of the original act." (Internal quotation marks omitted.) Indeed, the legislature in making the amendment went so far as to specifically clarify its intent that the removal of "ownership" in § 12-391 was to be applied retroactively. See § 12 of P.A. 14-155.[6]

Our courts have recognized that there is no precise definition of substantive or procedural law. "[A] substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." (Internal quotation marks omitted.) Carr v. Planning & Zoning Commission, 273 Conn. 573, 593, 872 A.2d 385 (2005). As noted in Samnard Associates, LLC v. New Britain, 140 Conn. App. 290, 298, 58 A.3d 377 (2013), whether or not a legislative change is substantive or procedural, the legislative history and circumstances surrounding the amendment are important in ascertaining legislative intent.

Public Act 14-155 clearly expresses the legislative intent that § 120 of P.A. 13-247 was to be applied retroactively and was not substantive in nature. See also Andersen

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Public and Special Acts February 2014 Regular Session, p. 1081: "Section 12 (*effective from passage*). Section 120 of P.A. 13-247, shall take effect June 19, 2013. It is the intent of the General Assembly that the amendments made by § 120 of P.A. 13-247 to subsections (d) and (e) of § 12-391 of the general statutes, as amended by this act, are clarifying in nature and apply to all open estates."

Consulting, LLP v. Gavin, 255 Conn. 498, 517, 767 A.2d 692 (2001), "[w]here an amendment is intended to clarify the original intent of an earlier statute, it necessarily has retroactive effect. . . ."

Q3 Answer:

> Connecticut cannot tax intangibles that are not in the control and possession of a person residing in Connecticut at the time of his or her death. Such a tax would be in violation of the U.S. Constitution, as referenced in P.A. 13-247. In the present case, there was no violation of the U.S. Constitution because Helen (under the fictional concept) had possession and control of the stocks, bonds and cash contained in her estate. Therefore, as a resident of Connecticut at the time of her death, Connecticut had jurisdiction to tax these intangibles. There was no violation of the rights of the plaintiffs as remaindermen because "[t]he estate tax does not deprive the remaindermen of their interest in the [QTIP] property or change the nature of their interest. It simply taxes the transfer of assets." In re Estate of Hambleton, 335 P.3d 398, 412 (Wash. 2014). As noted in United States v. Carlton, 512 U.S. 26, 33, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994), "[t]ax legislation is not a promise, and a taxpayer has no vested right in the [IRC]. . . . Taxation is [not] a penalty imposed on the taxpayer . . . but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. . . ." (Citation omitted; internal quotation marks omitted.)

Accordingly, for the above stated reasons, judgment may enter in favor of the defendant commissioner on his motion for summary judgment. The plaintiffs' motion for summary judgment is denied. No costs are awarded to any party.

Arnold W. Aronson
Judge Trial Referee