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all inclusive as the Louisville ordinance. The Wyoming constitution provides that no tax may be levied, except in pursuance of law.[18] Section 29-107, Wyo. Comp. Stat. 1945, authorizes cities and towns to levy and collect license taxes, for the purpose of raising revenue, on any business conducted or carried on within the city or town.[19] These provisions seem clearly to indicate that an occupation tax can only be imposed upon a person who engages in a business, and not upon a mere employee.

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ESTATE TAX REVISION

The United States Supreme Court has again changed the estate tax picture. In two cases decided Janury 17, 1949, the court held first, that the retention of a life estate in a trust makes the entire value of the trust corpus includable in the gross estate regardless of when the trust was formed[1] and second, that the entire value of a trust is includable in the gross estate of the grantor if there is any possibility of reversion by the terms of the instrument or by operation of law even if the value of the reversion is de minimis.[2]

These decisions are based upon construction of sec. 811c of the Internal Revenue Code,[3] which reads as follows:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer by trust or otherwise under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of or the right to the income from, the property, or (2) the right, either alone or in conjunction with any other person, to designate the persons who shall possess or enjoy the property or the income therefrom. . . ."[4]

The first leading case construing the similar sec. 402c of the Revenue Act of 1921, c. 136[5] is *Reinecke v. Northern Trust Co.* (1929)[6] which held that two trusts in which the grantor retained a life estate were taxable because the grantor also retained the sole power to revoke or modify, and that five trusts in which the

18. Wyo. Const. Art. XV, sec. 13.
19. Wyo. Comp. Stat. 1945 sec. 29-107. "For the purpose of raising revenue, any city or town, incorporated under special or general laws of the state of Wyoming, is hereby authorized to levy and collect a license tax on any business whatsoever conducted, carried on, or trafficked in within the limits of such city or town and the city or town council is hereby authorized to enact an ordinance carrying into effect the provisions of this section. . . ."

1. Commissioner v. Church's Estate, 335 U. S. 632, 69 Sup. Ct. 322, 93 L. Ed. 310 (1949).
2. Spiegel's Estate v. Commissioner, 335 U. S. 701, 69 Sup. Ct. 301, 93 L. Ed. 327 (1949).
3. 26 U. S. C. A. 811c.
4. 56 Yale L. J. 176 (1946). The origin of the phrase, "Intended to take effect in possession or enjoyment at or after . . . death" was the Penn. Act of 1925-6, c. 72. Construed in Reish, Admr. v. Commonwealth, 106 Pa. 521 (1884).
5. Revenue Act of 1921, c. 136, 41 Stat. 1359.
6. 278 U. S. 339, 49 Sup. Ct. 123 ,73 L. Ed. 410, 66 A. L. R. 397 (1929).

grantor retained the power to alter, amend or modify in conjunction with one or more beneficiaries were not taxable because the grantor had relinquished effective control before death.[7]

The next case was *May v. Heiner* (1930)[8] which held that retention of a life estate did not make the corpus includable in the gross estate. This decision was followed in 1931 in three cases[9] and Congress, immediately after these cases, passed a joint resolution to make such retentions taxable for estates created after the enactment of the resolution.[10] This resolution is now a part of sec. 811c supra and was construed in *Hassett v. Welch*[11] to affect only estates created after the date of the resolution.

In the case of *Klein v. The United States*[12] it was held that the death of the grantor vested the wife's previously contingent remainder and was taxable as an interest passing upon the grantor's death. The grant provided that ". . . if she shall die prior to the decease of said grantor then and in that even she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor . . .".

Helvering v. St. Louis Union Trust Co.[13] came next and it held that extinction of a possibility of reverter did not render sec. 811c *supra* applicable. The language of the grant was "If the grantor still be living, (upon death of the grantee) the Trustee shall forthwith ... transfer ... the entire estate to the grantor, to be his absolutely". This was expressly overruled by the next case, *Helvering v. Hallock*[14] which held that the trust was includable in the gross estate as the death of the grantor removed the possibility that the corpus would revert to him whether the interests created were determinable fees or contingent remainders. The treasury recognized the hardship the *Hallock* doctrine placed upon grantors and ruled that it would not apply to transfers made between the date of the *St. Louis Union Trust* case and the date of the *Hallock* case.[15]

Three cases[16] decided in 1945 held that if the corpus does not shed the

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7. The power to amend the five trusts is now taxable under sec. 811c. See Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 56 Sup. Ct. 70, 80 L. Ed. 62, 121 A. L. R. 362 (1935).
8. 281 U. S. 238, 50 Sup. Ct. 286, 74 L. Ed. 826, 67 A. L. R. 1244 (1930).
9. Burnet v. Northern Trust Co., 41 F. (2d) 732 (C. C. A. 7th 1930), aff'd 283 U. S. 782; Morsman v. Commissioner, 44 F. (2d) 902 (C. C. A. 8th 1930), rev'd 283 U. S. 783; McCormick v. Burnet, 43 F. (2d) 277 (C. C. A. 7th 1930), rev'd 283 U. S. 784.
10. Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516, p. 168 Federal Taxation by Griswold (2d. ed.).
11. 303 U. S. 303, 58 Sup. Ct. 559, 82 L. Ed. 858 (1938).
12. 283 U. S. 231, 51 Sup. Ct. 398, 75 L. Ed. 996 (1931).
13. 296 U. S. 39, 56 Sup. Ct. 74, 80 L. Ed. 29, 100 A. L. R. 1239 (1935); companion case, Becker v. St. Louis Union Trust Co., 296 U. S. 48, 56 Sup. Ct. 78, 80 L. Ed. 35 (1935).
14. 309 U .S. 106, 60 Sup. Ct. 444, 84 L. Ed. 604, 125 A. L. R. 1368 (1940).
15. Internal Revenue Regulations 105 sec. 81.17. A number of cases by the Tax Court and Circuit Courts holding that a possibility of reversion by operation of law is not taxable are collected in P-H Tax Serv. par. 23, 298 (1948). Others holding that such a reversion is taxable are listed in par. 23, 598B of the same service.
16. Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108, 65 Sup. Ct. 508, 89 L. Ed. 782, 159 A. L. R. 227 (1945); Commissioner v. Estate of Field, 324 U. S. 113, 65 Sup. Ct. 511, 89 L. Ed. 786, 159 A. L. R. 230 (1945); Goldstone v. United States, 325 U. S. 687, 65 Sup. Ct. 1323, 89 L. Ed. 1871, 159 A. L. R. 1330 (1945).

possibility of reversion until at or after the grantors death the value of the entire corpus at the date of death is taxable and not the value of the reversion.

These cases culminated last January in the cases of *Commissioner v. Church's Estate*[17] and *Spiegel's Estate v. Commissioner*[18] which expressly overruled *May v. Heiner supra, Hassett v. Welch supra,* and by implication at least, *Reinecke v. Northern Trust Co. supra.* The Supreme Court held that the retention of a life estate makes the entire corpus includable in the gross estate regardless of the date of reservation and that a remote possibility of reversion by operation of law is enough to make the entire corpus includable in the gross estate. The effect of these cases may be observed in the *Spiegel* case itself. The decedent created a $1,000,000.00 trust in 1920. At that time the value of the possibility of reversion was $4,000.00. When he died in 1946 the value of the reversion was $70.00. His estate must now pay a tax of $450,000.00 upon this trust alone.

The treasury interpreted the *Hallock* case to require that if (1) possession or enjoyment can be obtained only by beneficiaries who must survive the grantor and (2) the grantor or his estate possess any right or interest in the property, the trust is taxable.[19] The court said in *Church's Estate,* "After such a transfer has been made, the settlor must be left with no present legal title in the property, no possible reversionary interest in that title, and no right to possess or to enjoy the property then or thereafter. We declared this to be the effect of the *Hallock* case . . ."[20] This language seems to indicate that if either condition is present the trust is taxable. Mr. Justice Reed thinks the majority opinion still requires the presence of both conditions, however.[21] So until and unless the treasury issues new regulations it will probably be safe to proceed under the present regulations which require both conditions as the court said it was merely applying the *Hallock* rule and the regulations purport to announce the same rule.

Immediate action should be taken, however, by anyone who has retained a life estate or created a trust with any possibility of reversion which, if included in his gross estate, would bring the estate above the minimum for taxation ($60,000.00). The life estate may be released or given away and the possibility of reversion should be eliminated by making one of the other beneficiaries the ultimate beneficiary with express provision that the grantor will not be one of the heirs. A gift tax will probably be involved in either event and great care should be exercised to emphasize life motives to minimize the possibility that the Commissioner will attempt to tax the transfer under the contemplation of death provision of sec. 811c *supra.*

These cases may be criticized on several grounds of varying validity. The cases discuss the following: (1) Did the applicable state law provide for a reversion?, (2) the intent of the grantor, (3) de minimis, and (4) stare decisis. One further ground should be considered. The court said,[22] "The taxable event

17. 335 U. S. 632, 69 Sup. Ct. 322, 93 L. Ed. 310 (1949).
18. 335 U. S. 701, 69 Sup. Ct. 301, 93 L. Ed. 327 (1949).
19. Sec. 81.17 of Internal Revenue Regulation 105.
20. 69 Sup. Ct. 322, 329.
21. 69 Sup. Ct. 322, 337.
22. 69 Sup. Ct. 322, 328.

is a transfer inter vivos. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment." This appears to be contradictory. If the transfer is inter vivos the grantee may immediately enjoy, if it is not intervivos then why did the court so state, and then "find" a "string" attached to the gift? The court justifies its result by stating that Congress may set varying rates for different types of gifts. This may be true but if Congress intended such a result why did it not provide for it in the gift tax law instead of the estate tax law as interpreted in this case?[23]

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23. The Spiegel case was discussed after the decision for the Commissioner, 159 F. (2d) 257 (C. C. A. 7th 1946), in 42 Ill. L. Rev. 561 and 9 U. of Pitt. L. Rev. 45.